No. 16-348
Title: Midland Funding, LLC, Petitioner
v.
Aleida Johnson
Docketed: September 16, 2016
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (15-11240)
Decision Date: May 24, 2016
Rehearing Denied: August 19, 2016
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 16 2016	Petition for a writ of certiorari filed. (Response due October 17, 2016)
Sep 19 2016	Brief of respondent Aleida Johnson filed.
Sep 20 2016	Letter of September 20, 2016, from counsel for petitioner received waiving the 14-day waiting period for the distribution of the petition pursuant to Rule 15.5.
Sep 21 2016	DISTRIBUTED for Conference of October 7, 2016.
Sep 21 2016	Reply of petitioner Midland Funding, LLC filed. (Distributed)
Oct 11 2016	Petition GRANTED.
Nov 1 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Nov 4 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 14 2016	Brief of petitioner Midland Funding, LLC filed.
Nov 14 2016	Joint appendix filed. (Statement of costs filed.)
Nov 18 2016	Brief amicus curiae of DBA International, Inc. filed.
Nov 21 2016	Brief amicus curiae of The Chamber of Commerce of the United States of America filed.
Nov 21 2016	Brief amicus curiae of Resurgent Capital Services, L.P. filed.
Nov 21 2016	Brief amicus curiae of ACA International filed.
Nov 21 2016	Brief amici curiae of NARCA - National Creditors Bar Association, et al. filed.
Dec 5 2016	SET FOR ARGUMENT on Tuesday, January 17, 2017.
Dec 7 2016	Record requested from U.S.C.A. 11th Circuit.
Dec 9 2016	Record received from the U.S.C.A. 11th Circuit. The record is electronic and available on PACER.
Dec 12 2016	CIRCULATED.
Dec 14 2016	Brief of respondent Aleida Johnson (Reprinted) filed. (Distributed)
Dec 21 2016	Brief amicus curiae of United States filed. (Distributed)
Dec 21 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 21 2016	Brief amicus curiae of National Association of Chapter Thirteen Trustees filed. (Distributed)
Dec 21 2016	Brief amicus curiae of G. Eric Brunstad, Jr. filed. (Distributed)

Dec 21 2016	Brief amici curiae of National Association of Consumer Bankruptcy Attorneys, et al. filed. (Distributed)
Dec 21 2016	Brief amici curiae of Public Citizen, Inc., et al. filed. (Distributed)
Jan 6 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 6 2017	Reply of petitioner Midland Funding, LLC filed. (Distributed)
Jan 17 2017	Argued. For petitioner: Kannon K. Shanmugam, Washington, D. C. For respondent: Daniel L. Geyser, Dallas, Tex.; and Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

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RECORD AND BRIEF

16-348

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act.

2. Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.

CORPORATE DISCLOSURE STATEMENT

Petitioner Midland Funding, LLC, is a subsidiary of Encore Capital Group, Inc., a publicly held company. Encore Capital Group has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Moses, In re, 542 B.R. 5 (Bankr. N.D. Ala. 2015) 15
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Fed. R. Bankr. P. 9011(b) 5
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Miscellaneous:

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Miscellaneous—continued:

Sean Peter Doran, *Bringing Bankruptcy Back: Reconciling the Bankruptcy Code and the Fair Debt Collection Practices Act*, Norton Annual Survey of Bankruptcy Law (Sept. 2016) 17

In the Supreme Court of the United States

No.

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Midland Funding, LLC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 823 F.3d 1334. The order of the district court granting petitioner's motion to dismiss (App., *infra*, 18a-37a) is reported at 528 B.R. 462.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2016. A petition for rehearing was denied on August 19, 2016 (App., *infra*, 16a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Relevant provisions of the Bankruptcy Code, 11 U.S.C. 101-1532; the Fair Debt Collection Practices Act, 15 U.S.C. 1692-1692p; and the Federal Rules of Bankruptcy Procedure are reproduced in the appendix to this petition (App., *infra*, 38a-43a).

STATEMENT

This case presents two closely related questions concerning the relationship between two federal statutory schemes. The Bankruptcy Code (Code) entitles a creditor to file a proof of claim in a bankruptcy proceeding; the Code and accompanying rules require the creditor to include certain information in order to enable parties in interest to assess the claim's timeliness, and they provide a remedial scheme to address improper filings. The earlier-enacted Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from engaging in unfair, deceptive, or misleading debt-collection practices. The questions presented by this case are, first, whether a debt collector violates the FDCPA by filing an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding, and, second, whether the Bankruptcy Code precludes such an application of the FDCPA.

Petitioner is a debt purchaser who acquired respondent's defaulted credit card account. When respondent filed for bankruptcy, petitioner filed a proof of claim in respondent's bankruptcy case. The proof of claim accurately listed the amount of the debt and other required

information, including the date of the last transaction on respondent's account. Because the date of the last transaction was more than six years before petitioner's filing, the debt was time-barred under the relevant state law. Respondent objected to petitioner's claim, and the bankruptcy court disallowed it.

Respondent then sued petitioner, alleging that the filing of a proof of claim on a time-barred debt violated the FDCPA. The district court granted petitioner's motion to dismiss. It held, first, that under binding circuit precedent, the filing of a proof of claim on a time-barred debt in a bankruptcy proceeding violates the FDCPA, but, second, that such an application of the FDCPA is precluded by the later-enacted Bankruptcy Code, which allows creditors to file such claims.

The Eleventh Circuit reversed and remanded. Despite agreeing with the district court that the Code allows creditors to file proofs of claim on time-barred debts, the Eleventh Circuit reiterated its prior holding that debt collectors violate the FDCPA when they file such claims, then further held that applying the FDCPA to such conduct does not give rise to an irreconcilable conflict with the Code. The Eleventh Circuit's decision in this case conflicts with decisions of the Fourth, Seventh, and Eighth Circuits, which hold that filing an accurate proof of claim for a time-barred debt in a bankruptcy proceeding does not violate the FDCPA, and is inconsistent with a decision of the Second Circuit holding that the filing of even an invalid proof of claim is not actionable under the FDCPA. The Eleventh Circuit's decision further conflicts with a decision of the Ninth Circuit holding that the Bankruptcy Code broadly precludes the application of the FDCPA to conduct occurring within bankruptcy proceedings, as well as decisions of the Ninth Circuit's Bankruptcy Appellate

Panel applying that holding to reach the specific conclusion that the Code precludes an FDCPA action based on filing a proof of claim for a time-barred debt.

Because the Eleventh Circuit's decision squarely conflicts with the decisions of other circuits on two important questions of federal law, and because this case is an optimal vehicle in which to address those closely related questions, the petition for a writ of certiorari should be granted.

A. Background

1. Enacted in 1978, the Bankruptcy Code governs the distribution of a debtor's estate. Under the Code, "[w]hen a debtor declares bankruptcy, each of its creditors is entitled to file a proof of claim" against the debtor's estate. *Travelers Casualty & Surety Co.* v. *Pacific Gas & Electric Co.*, 549 U.S. 443, 449 (2007); see 11 U.S.C. 501. As is relevant here, the Code defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. 101(5)(A). As this Court has repeatedly recognized, that language gives "claim" the "broadest available definition." *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991); see *FCC* v. *NextWave Personal Communications Inc.*, 537 U.S. 293, 302 (2003).

"Once a proof of claim has been filed, the court must determine whether the claim is 'allowed' under [Section] 502(a) of the Bankruptcy Code." *Travelers*, 549 U.S. at 449. By default, a claim is "deemed allowed" unless a party in interest objects. 11 U.S.C. 502(a). In consumer bankruptcies, moreover, the Code provides for the appointment of a trustee, who is required to "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. 704(a)(5); 11 U.S.C. 1302(b)(1). If a

trustee or other party in interest objects to a claim, the bankruptcy court must determine whether the claim should be disallowed under any of the "exceptions" listed in the Code. *Travelers*, 549 U.S. at 449; see 11 U.S.C. 502(b).

A debt may be disallowed because it is "unenforceable * * * under any * * * applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. 502(b)(1). In particular, the Code provides that the estate is entitled to any "defense" available to the debtor, "including statutes of limitation." 11 U.S.C. 558. For claims based on open-ended or revolving consumer credit agreements, in order to aid interested parties in "assessing the timeliness of the claim," Fed. R. Bankr. P. 3001 advisory committee's notes (2012), the Federal Rules of Bankruptcy Procedure require the creditor to include certain information in the proof of claim, including the date of the account holder's last transaction; the date of the last payment on the account; and the date the account was charged to profit and loss. See Fed. R. Bankr. P. 3001(c)(3)(A)(iii)-(v).

The Bankruptcy Code has a comprehensive remedial scheme for actions taken in bankruptcy proceedings that bankruptcy courts view as improper. The Code permits a bankruptcy court to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a). And the Federal Rules of Bankruptcy Procedure specifically provide that presenting any document to the court constitutes a certification that the document is not presented "for any improper purpose" and that any "legal contentions * * * are warranted by existing law" or by an argument for modifying the law. Fed. R. Bankr. P. 9011(b).

2. This case concerns the interplay between the Bankruptcy Code and the Fair Debt Collection Practices Act, enacted a year earlier in 1977. The FDCPA bars debt collectors—that is, entities that "regularly collect[] or attempt[] to collect, directly or indirectly," debts owed to another, 15 U.S.C. 1692a(6)—from engaging in certain practices. Specifically, the FDCPA bars debt collectors from using "unfair or unconscionable means to collect or attempt to collect any debt," including "collect[ing] * * * any amount" that is not "expressly * * * permitted by law." 15 U.S.C. 1692f. It also bars debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "false[ly] represent[ing] * * * the character, amount, or legal status of any debt." 15 U.S.C. 1692e. The FDCPA creates a private right of action for consumers against debt collectors for actual and statutory damages as well as costs (including attorney's fees). See 15 U.S.C. 1692k.

B. Facts And Procedural History

1. In 2014, respondent filed a petition for bankruptcy in the United States Bankruptcy Court for the Southern District of Alabama under Chapter 13 of the Bankruptcy Code. Respondent was represented by counsel in the bankruptcy proceeding, and the bankruptcy court duly assigned a trustee to respondent's case. Petitioner, which had previously purchased a $1,879.71 debt incurred by respondent, filed a corresponding proof of claim in respondent's bankruptcy proceeding. As required by Federal Rule of Bankruptcy Procedure 3001, petitioner's proof of claim accurately listed the date of the last transaction on respondent's account as May 2003. The relevant State for choice-of-law purposes was Alabama, which has a six-year

limitations period, Ala. Code § 6-2-34; that period had expired by the time petitioner filed its proof of claim. Respondent's counsel objected to petitioner's claim, and the bankruptcy court disallowed it. App., *infra*, 3a.

2. Three days after the bankruptcy court disallowed the claim, respondent brought suit against petitioner in the United States District Court for the Southern District of Alabama under the Fair Debt Collection Practices Act. Respondent alleged that, because petitioner's proof of claim related to a time-barred debt, the filing of the proof of claim in respondent's bankruptcy proceeding constituted an unfair, deceptive, or misleading debt-collection practice under the FDCPA. App., *infra*, 3a-4a.

Petitioner moved to dismiss, and the district court granted the motion. App., *infra*, 18a-37a. The district court recognized that it was bound by the Eleventh Circuit's decision in *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (2014), cert. denied, 135 S. Ct. 1844 (2015), which held that the filing of a proof of claim for a time-barred debt violates the FDCPA. App., *infra*, 19a-20a. But the district court observed that the Eleventh Circuit had left open the question whether the Code precludes such an application of the FDCPA. *Id.* at 20a. The district court agreed with petitioner that it does. *Id.* at 20a-37a. In answering that question, the court observed that, under the relevant state law, the statute of limitations does not extinguish a creditor's right to payment, but instead simply eliminates the creditor's legal remedy to obtain a civil judgment against the debtor. *Id.* at 22a. Analyzing the text of the Code, this Court's precedents, and past bankruptcy practice, the district court determined that the Code permits a creditor to file a proof of claim for an unextinguished time-barred debt. *Id.* at 21a-30a. The district court then determined that there is an irreconcilable

conflict between the Code and the FDCPA, because "comply[ing] with the [FDCPA]" requires "surrendering [petitioner's] right under the Code." *Id.* at 33a. Accordingly, the court concluded that the earlier-enacted FDCPA "must give way to the Code." *Id.* at 37a.

3. The court of appeals reversed and remanded. App., *infra*, 1a-15a.*

The court of appeals first explained that it had decided a "nearly identical" question in *Crawford* and had held, in that case, that "a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred." App., *infra*, 2a, 5a. The court reapplied its holding in *Crawford* on that question. *Id.* at 5a-6a.

The court of appeals then turned to a question it had expressly "left open" in *Crawford*: namely, whether the Bankruptcy Code "preclude[s] an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred." App., *infra*, 7a. At the outset, the court of appeals agreed with the district court that, under the Code, a creditor has a "'right' to file a time-barred claim." *Id.* at 8a. The court explained that "the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations." *Id.* at 7a.

The court of appeals nevertheless concluded that the Code and the FDCPA "can coexist." App., *infra*, 13a. According to the court, the Code and the FDCPA could be "reconciled," because the FDCPA "dictates the behavior

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* The court of appeals considered this case together with another case in which the same district court had subsequently relied on the reasoning of its decision in this case. See App., *infra*, 4a. While the court of appeals addressed both cases in a single opinion, it entered separate judgments in each case. Petitioner is serving courtesy copies of this petition on the parties to that case. Cf. S. Ct. R. 12.6.

of only 'debt collectors,'" a subcategory of the "creditors" covered by the Code, and because the Code "establishes the ability to file a proof of claim," while the FDCPA "addresses the later ramifications of filing a claim." *Id.* at 12a. The court reasoned that there was no "positive repugnancy" between the statutes, because a debt collector that files a proof of claim for a time-barred debt (as authorized under the Code) "is simply opening himself up to a potential lawsuit for an FDCPA violation." *Id.* at 14a (internal quotation marks omitted). In the court of appeals' view, subjecting conduct permitted under the Bankruptcy Code to civil liability under the FDCPA does not give rise to an irreconcilable conflict between the two statutes. *Id.* at 15a.

4. Petitioner filed a petition for rehearing, arguing that the court of appeals' decision in this case (like its prior decision in *Crawford*) conflicted with the decisions of several other circuits. While the rehearing petition was pending, petitioner notified the court of appeals of recent decisions from two other circuits that had expressly declined to follow its reasoning. The court of appeals nevertheless denied rehearing without a single judge calling for a vote on the petition. App., *infra*, 16a-17a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision in this case conflicts with the decisions of at least three other courts of appeals on the question whether the filing of an accurate proof of claim on a time-barred debt violates the FDCPA. The Eleventh Circuit's decision further conflicts with the decision of another court of appeals on the closely related question whether the Bankruptcy Code precludes such an application of the FDCPA. Those conflicts create intolerable discord on important issues of bankruptcy law and

federal statutory interpretation, and they cannot be resolved without the Court's review. Because this case presents an optimal vehicle for addressing and resolving both conflicts, the petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

As multiple courts of appeals have recognized, "[t]here is a circuit split on the issue of whether filing a proof of claim on a stale debt in bankruptcy is a misleading or deceptive act prohibited by the FDCPA." *Owens* v. *LVNV Funding, LLC*, ___ F.3d ___, 2016 WL 4207965, at *5 (7th Cir. Aug. 10, 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016); see *In re Dubois*, ___ F.3d ___, 2016 WL 4474156, at *6 & n.6 (4th Cir. Aug. 25, 2016); *Nelson* v. *Midland Credit Management, Inc.*, ___ F.3d ___, 2016 WL 3672073, at *2 (8th Cir. July 11, 2016). The Fourth, Seventh, and Eighth Circuits have all expressly considered and rejected the Eleventh Circuit's holding in *Crawford* that the filing of a proof of claim for a time-barred debt in a bankruptcy proceeding is actionable under the FDCPA. See *Nelson*, 2016 WL 3672073, at *2; *Owens*, 2016 WL 4207965, at *5-*6; *Dubois*, 2016 WL 4474156, at *6 & n.6. And respondent has expressly conceded the existence of a circuit conflict. See C.A. Resp. Opp. to Mot. to Stay 1 (agreeing that "[petitioner] is correct that the circuits have squarely divided over these issues, and there is at least a 'reasonable probability' of Supreme Court review" (citation omitted)).

In this case, the Eleventh Circuit reinforced the existing circuit conflict by adhering to its holding in *Crawford*, and it created a new circuit conflict by further holding that the Bankruptcy Code does not preclude the application of the FDCPA to the filing of an accurate proof of claim for

a time-barred debt. At least three other courts of appeals would not even recognize an FDCPA claim in such circumstances, and another court of appeals would hold such a claim precluded by the Bankruptcy Code. The district and bankruptcy courts that routinely confront these questions, moreover, are hopelessly divided. This Court's review is thus sorely needed.

1. As to the first question presented—whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the FDCPA—the Eleventh Circuit's decision in this case (like its prior decision in *Crawford*) squarely conflicts with decisions of the Fourth, Seventh, and Eighth Circuits, and it cannot be reconciled with a decision from the Second Circuit that resolved a similar, albeit broader, question.

a. The Eighth Circuit—the first court of appeals to address the issue after the Eleventh—faced a materially identical factual scenario but reached the opposite conclusion. In *Nelson*, *supra*, an affiliate of the petitioner in this case was sued under the FDCPA for filing a proof of claim on a time-barred debt in a bankruptcy proceeding. See 2016 WL 3672073, at *1. The Eighth Circuit expressly declined to follow the Eleventh Circuit's reasoning, noting that the Eleventh Circuit had "ignore[d] the differences between a bankruptcy claim and actual or threatened litigation." *Id.* at *2. Instead, citing the "protections against harassment and deception" inherent in the bankruptcy process, the Eighth Circuit concluded that "[a]n accurate and complete proof of claim on a time-barred debt is not false, deceptive, misleading, unfair, or unconscionable under the FDCPA." *Ibid.*

The Seventh Circuit addressed the same question in *Owens*, *supra*. Like the Eighth Circuit, the Seventh Circuit "decline[d] to follow the Eleventh Circuit's approach." 2016 WL 4207965, at *6. The Seventh Circuit

first observed that a proof of claim filed under the Bankruptcy Code "does not purport to be anything other than a claim subject to dispute in the bankruptcy case." *Id.* at *5. The court then reasoned that, in light of the various protections for debtors under the Code, concerns about filing a time-barred claim "are less acute" in bankruptcy proceedings than in a lawsuit, and the inclusion of required information about the amount of the claim and the date of the last transaction ensures that the proofs of claim are "not deceptive or misleading." *Id.* at *6. Dissenting, Chief Judge Wood would have held that filing a time-barred proof of claim "violates the FDCPA" and so "would [have] align[ed] th[e] court with the Eleventh Circuit" in the "existing circuit split." *Id.* at *10.

In the most recent circuit decision on this question, the Fourth Circuit joined the majority side of the conflict. In *Dubois*, *supra*, the Fourth Circuit noted that the Eleventh Circuit was "the only court of appeals to hold that filing a proof of claim on a time-barred debt in a Chapter 13 proceeding violates the FDCPA." 2016 WL 4474156, at *6 n.6. The Fourth Circuit began by explaining that, when a statute of limitations does not "extinguish debts" but simply eliminates the remedy, "a time-barred debt falls within the Bankruptcy Code's broad definition of a claim," with the result that the Code "permits such filing." *Id.* at *6. Indeed, the court observed that, from a bankruptcy perspective, the "optimal scenario" is for time-barred proofs of claim to be filed and for "the Bankruptcy Code to operate as written," bringing those claims into the bankruptcy proceeding and then disallowing them. *Ibid.* Describing the myriad differences between a state-court lawsuit filed by a creditor and bankruptcy proceedings initiated by a debtor, the court explained that "the reasons why it is 'unfair' and 'misleading' to sue on a time-barred

debt are considerably diminished in the bankruptcy context." *Id.* at *7. Accordingly, the court disagreed with the Eleventh Circuit and concluded that the filing of such a proof of claim does not violate the FDCPA. See *id.* at *8. Dissenting, Judge Diaz concluded that the conduct was actionable under the FDCPA and, addressing a question not reached by the majority (but resolved in the decision below in this case), further concluded that the Bankruptcy Code does not preclude such an application of the FDCPA. See *id.* at *8-*11.

b. The Eleventh Circuit's decision in this case also cannot be reconciled with a decision of the Second Circuit, which has left no doubt that it would reach the opposite conclusion on the facts presented here. In *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010), the creditor filed an inflated proof of claim in the debtor's bankruptcy proceeding, misstating the amount of the debt owed, and the debtor sued the creditor under the FDCPA. See *id.* at 94-95. The Second Circuit held that the debtor had failed to state a claim. See *id.* at 94. The Second Circuit explained that "[t]here is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself." *Id.* at 96. The Second Circuit concluded that "filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA." *Id.* at 95. In light of its holding and reasoning in a case involving a proof of claim that was affirmatively misleading, there can be little doubt that the Second Circuit would reach the same result in a case such as this one, where the proof of claim was in fact accurate.

2. In addition to the widely acknowledged conflict on the first question presented, the Eleventh Circuit's deci-

sion in this case created a further conflict on a closely related second question—whether, if the filing of a proof of claim on a time-barred debt violates the FDCPA, the Bankruptcy Code precludes the FDCPA's application.

In the decision under review, the Eleventh Circuit held that the Bankruptcy Code can coexist with an FDCPA claim based on a time-barred proof of claim. See App., *infra*, 10a-15a. The Ninth Circuit, however, has reached the opposite conclusion, broadly holding that the Code displaces the FDCPA in the context of bankruptcy proceedings. In *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002), the debtor sued a creditor under the FDCPA for attempting to collect a discharged debt in a Chapter 7 bankruptcy. See *id.* at 504. The Ninth Circuit held that no claim would lie, on the ground that "permit[ting] a simultaneous claim under the FDCPA" would "circumvent the remedial scheme of the Code under which Congress struck a balance between the interests of debtors and creditors by permitting (and limiting) debtors' remedies." *Id.* at 510. The court explained that, once a debtor is in bankruptcy, "the debtor's protection and remedy remain under the Bankruptcy Code," and "[n]othing in either [the Code or the FDCPA] persuades us that Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA." *Ibid.*

Under the Ninth Circuit's reasoning in *Walls*, application of the FDCPA to the filing of a proof of claim—conduct similarly governed by the Code—would plainly be precluded. Indeed, applying *Walls*, the Ninth Circuit Bankruptcy Appellate Panel has so held in two separate cases. The first case involved a creditor's proof of claim for a debt that the debtor maintained was time-barred and invalid. See *In re Chaussee*, 399 B.R. 225, 227 (B.A.P. 9th Cir. 2008). After "assum[ing]" that the conduct at issue constituted a violation of the FDCPA, see *id.* at 235 n.12,

the Bankruptcy Appellate Panel held that the "Code precludes the application of the FDCPA under these facts." *Id.* at 235. The court reasoned that the Code and the FDCPA have different and conflicting requirements for asserting a debt, see *id.* at 237-238, and it observed that "the [Bankruptcy] Code and Rules are up to the task of compensating a debtor for any damages or costs occasioned by, and to punish and deter, those who would abuse the bankruptcy claims process," *id.* at 241.

The second case, *In re McCarther-Morgan*, No. 08-1093, 2009 WL 7810817 (B.A.P. 9th Cir. Jan. 27, 2009), aff'd, 373 Fed. Appx. 778 (9th Cir. 2010) (mem.), similarly considered a proof of claim for a debt that, according to the debtor, was time-barred and invalid. See *id.* at *1. The Bankruptcy Appellate Panel held that the Code precluded the application of the FDCPA, reasoning that "it is not possible to reconcile both the Bankruptcy Code[,] which authorizes the filing of proofs of claim, and the FDCPA[,] which, [the debtor] argues, prohibits the filing of certain proofs of claim." *Id.* at *13.

In addition, while the second question presented generally arises in courts that have held, as to the first question, that the filing of a proof of claim on a time-barred debt violates the FDCPA, numerous district and bankruptcy courts have addressed the second question and reached conflicting results—including several courts whose decisions were effectively reversed by the Eleventh Circuit in the opinion below. Compare, *e.g.*, *Mears* v. *LVNV Funding, LLC*, 541 B.R. 899, 905 (M.D. Fla. 2015); *Lewis* v. *LVNV Funding, LLC*, Civ. No. 15-61313, 2015 WL 5819992, at *1 (S.D. Fla. Oct. 6, 2015); *Middlebrooks* v. *Interstate Credit Controls, Inc.*, 391 B.R. 434, 437 (D. Minn. 2008); *In re Moses*, 542 B.R. 5, 12 (Bankr. N.D. Ala. 2015) (holding that the Code precludes such an application of the FDCPA), with, *e.g.*, *Carranza* v. *Midland Funding,*

LLC, Civ. No. 15-559, 2015 WL 5008462, at *5 (E.D. Mo. Aug. 20, 2015); *Grandidier* v. *Quantum3 Group, LLC*, Civ. No. 14-138, 2014 WL 6908482, at *2 (S.D. Ind. Dec. 8, 2014); *In re Perkins*, 533 B.R. 242, 255 (Bankr. W.D. Mich. 2015); *In re Marcinowski*, No. 13-33571, 2015 WL 3524977, at *4 (Bankr. N.D. Ill. June 2, 2015) (holding that the Code does not preclude such an application of the FDCPA). In light of that substantial body of authority, the reasoning on both sides of the second question, as with the first, is thoroughly developed.

3. The circuit conflicts on the closely related questions presented in this case are ripe for the Court's review. In its decision in this case, the Eleventh Circuit reaffirmed its position on the first question and unambiguously staked out its position on the second. In seeking rehearing, moreover, petitioner informed the Eleventh Circuit of all the decisions from other circuits discussed above (with the exception of the Fourth Circuit's subsequent decision in *Dubois*), yet the Eleventh Circuit denied rehearing without a single judge calling for a vote on the petition. See App., *infra*, 16a-17a. As a result, there is no realistic prospect that the circuit conflicts will resolve without the Court's intervention. Further review is therefore warranted.

B. The Questions Presented Are Important Ones That Warrant Review In This Case

The questions presented in this case are of exceptional legal and practical importance for debtors, creditors, and the bankruptcy system. This case, which cleanly and clearly presents both relevant questions, is the optimal vehicle for the Court's review.

1. As an initial matter, the existence of disparate rules in different circuits governing the same conduct is of significant practical importance for institutional creditors

such as petitioner. As matters currently stand, petitioner would be shielded from FDCPA liability for filing an accurate proof of claim on a time-barred debt as allowed by the Bankruptcy Code in the Fourth, Seventh, Eighth, and Ninth Circuits (and likely the Second Circuit as well), but would be exposed to liability in the Eleventh Circuit. In fact, petitioner and its affiliates are defendants in cases on both sides of the conflict: the Eighth and Eleventh Circuits have explicitly disagreed on whether Midland entities may be subject to FDCPA liability for materially identical conduct. Compare *Nelson*, 2016 WL 3672073, at *2, with App., *infra*, 15a.

As commentators have observed, "the bankruptcy system cannot continue to proceed with such significant rifts between circuits." Sean Peter Doran, *Bringing Bankruptcy Back: Reconciling the Bankruptcy Code and the Fair Debt Collection Practices Act*, Norton Annual Survey of Bankruptcy Law (Sept. 2016); see Brittany M. Dant, Comment, *Down the Rabbit Hole:* Crawford v. LVNV Funding, LLC, *Upends the Role of the Fair Debt Collection Practices Act in Consumer Bankruptcy*, 66 Mercer L. Rev. 1067, 1079 (2015) (warning of the potential for "major ramifications throughout the field of bankruptcy law" from the Eleventh Circuit's decision in *Crawford*). That situation is particularly untenable for nationwide entities such as petitioner and its affiliates, which file tens of thousands of claims in bankruptcies across the country every year. See American InfoSource, *AIS Insight 2015 Year in Review* 14 <tinyurl.com/AISTopCreditors> (noting that petitioner and its affiliates filed 92,580 claims in bankruptcies in 2015, amounting to more than $300 million).

Indeed, uniform interpretation is fundamental to the proper administration of the bankruptcy system, as the Constitution acknowledges by granting Congress power

"[t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4; see *Railway Labor Executives' Association* v. *Gibbons*, 455 U.S. 457, 471-472 (1982). Accordingly, this Court routinely grants review even on shallow circuit conflicts where the question presented concerns the correct interpretation or application of the Bankruptcy Code. See, *e.g.*, *Harris* v. *Viegelahn*, 135 S. Ct. 1829, 1836 (2015); *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014); *Hall* v. *United States*, 132 S. Ct. 1882, 1886 & n.1 (2012). Here, the Eleventh Circuit's approach is out of step with at least four other circuits, resulting in intolerable disuniformity. The significance of the questions presented in both practical and legal terms is undeniable.

2. This case constitutes an optimal vehicle for resolving the circuit conflicts. It easily satisfies the standard criteria for certiorari: the relevant facts are undisputed, the questions presented were raised below, and the court of appeals passed upon both questions in reaching its decision. There is thus no impediment to this Court's reaching and resolving the questions in this case.

Perhaps most importantly, this case presents both of the questions squarely and in depth. Because this case arises from the only court of appeals to have held that the filing of a proof of claim for a time-barred debt is actionable under the FDCPA, the decision below uniquely presents both the question whether the filing of such a claim violates the FDCPA and the question whether the Bankruptcy Code precludes such application of the FDCPA. These questions are closely related and involve the interpretation of overlapping statutory provisions.

It is essential to review both legal questions in order to answer the real-world question that underlies them: can a debtor sue a creditor under the FDCPA for filing an accurate proof of claim for a time-barred debt? Should

the Court resolve the circuit conflict on the first legal question in debtors' favor, it would have to address the second legal question in order conclusively to resolve the real-world question and provide the clarity that debtors, creditors, and courts sorely need. There would be little value (except perhaps for authors of law-review notes) in resolving the first question but leaving the second one hanging. And in addition to the Eleventh Circuit's prior decision analyzing the first question, the Eleventh Circuit and the district court in this case thoroughly analyzed the second question, setting out the opposing viewpoints and analysis in detail.

In short, the Eleventh Circuit's decision in this case solidifies a widely recognized conflict on the question whether the filing of an accurate proof of claim for a time-barred debt in a bankruptcy proceeding violates the FDCPA, and it creates a conflict on the closely related question whether such an application of the FDCPA is precluded by the Bankruptcy Code. Those questions are undeniably important and recurring, and this case is an optimal vehicle for considering them. The Court should grant the petition for certiorari and conclusively resolve whether a debtor can sue a creditor under the FDCPA for filing an accurate proof of claim for a time-barred debt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-11240

ALEIDA JOHNSON, f.k.a. Aleida Hill, individually and on behalf of all similarly situated individuals,
Plaintiff-Appellant,

v.

MIDLAND FUNDING, LLC, Defendant-Appellee.

No. 15-14116

JUDY N. BROCK, individually and on behalf of a class of others similarly situated, DONALD CUNNINGHAM,
Plaintiffs-Appellants,

v.

RESURGENT CAPITAL SERVICES, L.P., LVNV FUNDING, LLC, Defendants-Appellees.

Filed: May 24, 2016

Before: WILSON, MARTIN and HIGGINBOTHAM,* Circuit Judges.

OPINION

MARTIN, Circuit Judge.

Under the Bankruptcy Code ("Code"), a "creditor . . . may file a proof of claim" in a bankruptcy proceeding. 11 U.S.C. § 501(a). The Fair Debt Collection Practices Act ("FDCPA") prohibits a "debt collector" from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This Court held that a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred. *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014). In considering this case below, the District Court interpreted the *Crawford* ruling as having placed the FDCPA and the Code in irreconcilable conflict. We see no such conflict. Although the Code certainly allows all creditors to file proofs of claim in bankruptcy cases, the Code does not at the same time protect those creditors from all liability. A particular subset of creditors—debt collectors—may be liable under the FDCPA for bankruptcy filings they know to be time-barred. Because we find no irreconcilable conflict between the FDCPA and the Code, we reverse.

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*Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

I.

Aleida Johnson filed a Chapter 13 bankruptcy petition in March 2014. In May 2014, Midland Funding, LLC ("Midland") filed a proof of claim in her case, seeking payment of $1,879.71. Midland is a buyer of unpaid debt. Specifically, Midland purchases accounts with overdue unpaid balances and tries to collect those accounts. Midland's claim against Ms. Johnson originated with Fingerhut Credit Advantage, and the date of the last transaction on her account was listed as May 2003. This was over ten years before Ms. Johnson filed for bankruptcy. The claim arose in Alabama, where the statute of limitations for a creditor to collect an overdue debt is six years. *See* Ala. Code § 6-2-34.

Judy Brock also filed a Chapter 13 bankruptcy petition. Ms. Brock filed her petition in April 2014; in June 2014, Resurgent Capital Services, L.P. ("Resurgent") filed a proof of claim seeking payment of $4,155.40. Resurgent is a "manager and servicer of domestic and international consumer debt portfolios for credit grantors and debt buyers." Resurgent's filing was an attempt to collect Ms. Brock's debt on behalf of LVNV Funding, LLC, which is a purchaser of unpaid debt like Midland. Ms. Brock's debt originated with Washington Mutual Bank, N.A., and the date of the last transaction on her account was January 2008. There had been no activity on her account for over six years before Ms. Brock filed for bankruptcy.

Ms. Johnson and Ms. Brock (together, "Debtors") sued their respective creditors (together, "Claimants") under the FDCPA. The FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading

representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This includes attempting to collect a debt that is not "expressly authorized by the agreement creating the debt or permitted by law." *Id.* § 1692f(1). Both Debtors alleged in their lawsuits that the claims on their face were barred by the relevant statute of limitations. They argued that the proofs of claim were thus "'unfair,' 'unconscionable,' 'deceptive,' and misleading" in violation of the FDCPA.

Midland moved to dismiss Ms. Johnson's FDCPA suit, and the District Court granted the motion. The District Court read the Bankruptcy Code as affirmatively authorizing a creditor to file a proof of claim—including one that is time-barred—if that creditor has a "right to payment" that has not been extinguished under applicable state law. The District Court identified tension between this provision of the Code and the FDCPA, which makes it unlawful to file a proof of claim known to be time-barred. The court found this conflict to be irreconcilable and applied the doctrine of implied repeal to hold that a creditor's right to file a time-barred claim under the Code precluded debtors from challenging that practice as a violation of the FDCPA in the Chapter 13 bankruptcy context.

In Ms. Brock's later FDCPA suit, the District Court granted Resurgent's motion for judgment on the pleadings based on the rationale and holding in Ms. Johnson's case. The two cases were consolidated for this appeal.

II.

We review *de novo* the District Court's grant of a motion to dismiss for failure to state a claim. *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1275 (11th Cir. 2012).

Like the District Court, we accept the allegations in the complaint as true and construe the facts in the light most favorable to the plaintiff. *Id.* We apply the same standard of review to the District Court's judgment on the pleadings. *See Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002). Judgment on the pleadings is appropriate "when no issues of material fact exist, and the movant is entitled to judgment as a matter of law." *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996).

III.

The Debtors argue on appeal that the District Court's decision conflicts with our Circuit's precedent in *Crawford*. Again, *Crawford* held that a debt collector violates the FDCPA by knowingly filing a proof of claim in a bankruptcy proceeding on a debt that is time-barred. 758 F.3d at 1261. The Debtors here pursue their argument that the Code does not preclude this type of FDCPA claim simply because the claim was made in the context of a Chapter 13 bankruptcy case.

A.

In *Crawford*, this Court faced a question nearly identical to the one we consider here: "whether a proof of claim to collect a stale debt in Chapter 13 bankruptcy violates the [FDCPA]." 758 F.3d at 1256. We concluded there was an FDCPA violation in *Crawford*, based on "[t]he FDCPA's broad language, our precedent, and the record." *Id.* at 1257.

The *Crawford* panel first looked to the language of the FDCPA, which prohibits a "false, deceptive, or misleading representation," 15 U.S.C. § 1692e, or "unfair or unconscionable means," *id.* § 1692f, to collect on a debt.

758 F.3d at 1258. Because of the ambiguity in these terms, the Court adopted a "'least-sophisticated consumer' standard" to evaluate whether a debt collector's conduct was deceptive under the FDCPA. *Id.* It then concluded that "[s]imilar to the filing of a stale lawsuit," which is prohibited by the FDCPA for debts on which the statute of limitations has run, "a debt collector's filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt." *Id.* at 1261. This impression causes problems because "[t]he 'least sophisticated' Chapter 13 debtor may be unaware that a claim is time barred and unenforceable and thus fail to object to such a claim." *Id.* Then when the debtor fails to object, the time-barred debt becomes part of the debtor's repayment plan, which would "necessarily reduce[] the payments to other legitimate creditors with enforceable claims." *Id.* Thus *Crawford* held that the practice of filing time-barred proofs of claim was misleading under the FDCPA. *Id.*

In a footnote, the panel said it "decline[d] to weigh in on a topic the district court artfully dodged: Whether the Code 'preempts' the FDCPA when creditors misbehave in bankruptcy." *Id.* at 1262 n. 7. The Court said it "need not address this issue" because the claimant there "argue[d] only that its conduct does not fall under the FDCPA, or, alternatively, did not offend the FDCPA's prohibitions" and it "d[id] not contend that the Bankruptcy Code displaces or 'preempts' §§ 1692e and 1692f of the FDCPA." *Id.*

B.

We now answer the question left open in *Crawford*. The Bankruptcy Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred. We recognize that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations. However, when a particular type of creditor—a designated "debt collector" under the FDCPA—files a knowingly time-barred proof of claim in a debtor's Chapter 13 bankruptcy, that debt collector will be vulnerable to a claim under the FDCPA. Our examination of these statutes leads us to conclude that the Code and the FDCPA can be read together in a coherent way.

1.

Under the Bankruptcy Code, a "creditor . . . may file a proof of claim" in a debtor's bankruptcy. 11 U.S.C. § 501(a). A "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* § 101(5)(A). The Supreme Court interprets this language to create an "entitle[ment]" for creditors to file a proof of claim in a bankruptcy proceeding where a "right to payment" exists. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449, 127 S. Ct. 1199, 1204 (2007) (quotation omitted). A "right to payment" under the Bankruptcy Code "is nothing more nor less than an enforceable obligation." *Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559, 110 S. Ct. 2126, 2131 (1990).

The Debtors argue that there is no "right" to file a time-barred claim when there is no right to have that claim repaid in a Chapter 13 bankruptcy proceeding. We reject this argument, because the Code does allow claims in a Chapter 13 bankruptcy proceeding by a party who does not necessarily have a right to have his claim paid. *See In re McLean*, 794 F.3d 1313, 1321 (11th Cir. 2015) ("[T]he Bankruptcy Code explicitly contemplates that creditors may file unenforceable claims in the bankruptcy court."). And having a claim is not the same as being entitled to a remedy. Indeed, Alabama law, which governs the right of the Claimants to recover here, provides that "[w]hen the statute of limitations expires, it does not extinguish the cause of action; instead, it makes the remedy unavailable." *In re HealthSouth Corp.*, 974 So. 2d 288, 296 (Ala. 2007). So although a party may not be able to enforce its claim because of a statute-of-limitations bar, that party still may assert the claim in the first place. *See id.*

As the District Court pointed out, the Bankruptcy Code's procedure for addressing proofs of claim demonstrates that some filed claims will not ultimately be paid in a bankruptcy proceeding. Where a proof of claim is filed in a bankruptcy case, that claim is generally "deemed allowed," so it will be viewed as a valid claim and paid out of the bankruptcy estate. 11 U.S.C. § 502(a). However, the bankruptcy trustee is charged with "examin[ing] proofs of claim and object[ing] to the allowance of any claim that is improper." *Id.* § 704(a)(5); *see also id.* at § 1302(b)(1). Once the trustee objects, the bankruptcy court is in turn charged with determining whether the claim "is unenforceable against the debtor . . . under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." *Id.*

§ 502(b)(1); *see also id.* § 558 ("The [bankruptcy] estate shall have the benefit of any defense available to the debtor . . . including statutes of limitation."). Thus, where the bankruptcy process is working as intended, a time-barred proof of claim may be filed but will not be paid by the bankruptcy estate.

2.

So while we recognize that creditors can file proofs of claim they know to be barred by the relevant statute of limitations, those creditors are not free from all consequences of filing these claims. The FDCPA does not allow a debt collector to "use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. Neither may they "use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. A debt collector who violates one of these rules may face civil liability to the debtor. *Id.* § 1692k. As this Court recognized in *Crawford*, a debt collector violates the FDCPA by filing a knowingly time-barred proof of claim in a Chapter 13 bankruptcy proceeding. 758 F.3d at 1261.

Of course, the FDCPA does not reach all creditors. The statute applies only to "debt collectors," who are defined as "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). And "debt collectors" are a narrow subset of the universe of creditors who might file proofs of claim in a Chapter 13 bankruptcy. Under the Code, any "creditor" (defined as any "entity that has a claim against the debtor that arose at the time of or before the [bankruptcy] order") may file a proof of claim. 11 U.S.C.

§ 101(10)(A). So not all "creditors" who file a proof of claim in a Chapter 13 bankruptcy case can face potential FDCPA liability as "debt collectors."

Also, the FDCPA provides a safe harbor for debt collectors who might unintentionally or in good faith file such a claim. *See* 15 U.S.C. § 1692k(c). A debt collector who appears to have violated the FDCPA can avoid liability by showing (by a preponderance of evidence) that their violation "was not intentional and resulted from a bona fide error." *Id.* These two requirements—that the claim be filed by a "debt collector" and that the claim be "knowingly" time-barred—limit application of the FDCPA to a narrow range of actors and claims.

3.

The District Court found an "obvious tension" between the Bankruptcy Code and the FDCPA because "the Code permits creditors to file proofs of claim in Chapter 13 proceedings on debts known to be time-barred, while the Act prohibits debt collectors from engaging in such conduct." Based on its perception that this is an "irreconcilable conflict," the District Court found that the later-enacted Code impliedly repealed the earlier-enacted FDCPA. In that court's view, this prohibited the Debtors from seeking FDCPA remedies against the Claimants who had filed proofs of claim in their Chapter 13 bankruptcy cases.

Where two federal statutes conflict, a cause of action provided by one statute may be precluded by the provisions of the other. *See POM Wonderful LLC v. Coca-Cola Co.*, ___ U.S. ___, 134 S. Ct. 2228, 2236 (2014). Where there is such an "irreconcilable conflict, the later act to the extent of the conflict constitutes an implied re-

peal of the earlier one." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503, 56 S. Ct. 349, 352 (1936) (quotation omitted). However, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662, 127 S. Ct. 2518, 2532 (2007) (quotations omitted) (alteration adopted).

This is to say that courts must be modest in construing a repeal by implication. "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44, 122 S. Ct. 593, 605 (2001) (quotation omitted). For irreconcilable conflict to exist there must usually be some sort of "positive repugnancy" between the statutes at issue, because two statutes can typically coexist if they simply contain "different requirements and protections." *Id.* We will not infer a statutory repeal unless either the later statute expressly contradicts the earlier statute or this construction "is absolutely necessary" in order for the later statute to "have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662, 127 S. Ct. at 2532 (quotations omitted).

The FDCPA and the Code are not in irreconcilable conflict. The FDCPA and the Code differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist. *See POM Wonderful LLC*, 134 S. Ct. at 2238 (finding two federal statutes complementary to each other when they touched on the same general subject matter but each "ha[d] its own scope and purpose" and "impose[d] different require-

ments and protections" (quotation omitted)). There is no "positive repugnancy" between the statutes, because reading the two statutes as we described does not create such an express contradiction that implied repeal of the FDCPA "is absolutely necessary" in order for § 501(a) of the Bankruptcy Code (which creates the right to file a claim) to "have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662, 127 S. Ct. at 2532 (quotations omitted).

The Bankruptcy Code and the FDCPA can be reconciled because they provide different protections and reach different actors. *See J.E.M. Ag Supply, Inc.*, 534 U.S. at 142, 122 S. Ct. at 604 (finding no irreconcilable conflict where two regimes regulate at different levels of stringency and provide varying amounts of protection). The Code allows all "creditors" to file proofs of claim, *see* 11 U.S.C. § 101(10)(A), while the FDCPA dictates the behavior of only "debt collectors" both within and outside of bankruptcy, *see* 15 U.S.C. § 1692a(6). The Code establishes the ability to file a proof of claim, *see* 11 U.S.C. § 105(a), while the FDCPA addresses the later ramifications of filing a claim, *see Crawford*, 758 F.3d at 1257.

We read these regimes together as providing different tiers of sanctions for creditor misbehavior in bankruptcy. *Cf. POM Wonderful LLC*, 134 S. Ct. at 2238 ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."). In a Chapter 13 bankruptcy proceeding, the first potential line of protection against a creditor who files a time-barred proof of claim is for the bankruptcy trustee to object to the claim

during the course of the bankruptcy proceedings. *See* 11 U.S.C. §§ 704(a)(5), 1302(b)(1). If the bankruptcy court finds the objection to be proper, it can deny payment of the claim. *See id.* § 502(b)(1). Where a creditor's misbehavior is more severe, the Code provides a more powerful remedy. Bankruptcy courts have the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]," such as issuing sanctions against a party for misbehavior. *Id.* § 105(a).

The FDCPA easily lies over the top of the Code's regime, so as to provide an additional layer of protection against a particular kind of creditor. It kicks in only when the creditor is a debt collector that "regularly collects" or is in "any business the principal purpose of which is the collection" of debts. 15 U.S.C. § 1692a(6). And even then, the requirement for finding a violation is quite stringent—the creditor's behavior must reach the point of "unconsionab[ility]" or "decepti[on]." *Id.* §§ 1692e, 1692f. It is only under these circumstances that the FDCPA offers the severe remedy of civil liability for damages to the debtor. *See id.* § 1692k(a).

We thus conclude that the FDCPA and the Code can coexist. Our holding does not infringe any creditor's ability to file a claim in a debtor's bankruptcy proceeding. However, when a debt collector, as specifically defined by the FDCPA, files a proof of claim for a debt that the debt collector knows to be time-barred, that creditor must still face the consequences imposed by the FDCPA for a "misleading" or "unfair" claim. The Bankruptcy Code's rules about who can file claims do not shield debt collectors from the obligations that Congress imposed on them.

We reject the Claimants' assertion that potential consequences under the FDCPA for filing a time-barred proof of claim effectively forces a debt collector to "surrender[ ] its right to file a proof of claim." This argument misunderstands the relationship between the two statutes. There is no blanket prohibition on filing a time-barred claim in bankruptcy, and we say nothing to the contrary here.[1] In the same way, the Bankruptcy Code does not require any creditor to file a proof of claim in a bankruptcy proceeding—it only allows it. *See* 11 U.S.C. § 501(a). If a debt collector chooses to file a time-barred claim, he is simply opening himself up to a potential lawsuit for an FDCPA violation. This result is comparable to a party choosing to file a frivolous lawsuit. There is nothing to stop the filing, but afterwards the filer may face sanctions. *See* Fed. R. Civ. P. 11(b)-(c).

In closing, we observe that our conclusion that there is no "positive repugnancy" between the FDCPA and the Bankruptcy Code is bolstered by two additional facts. First, no provision in either the FDCPA or the Code "purports to govern the relevant interaction between the [two statutes]." *POM Wonderful LLC*, 134 S. Ct. at 2237. Second, Congress never expressed a "clear and manifest intent" to repeal the protections of the FDCPA when it enacted the Bankruptcy Code only one year later. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 662, 127 S. Ct. at 2532. Because the FDCPA and the Bankruptcy Code

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[1] Such an outcome would be inappropriate, because the FDCPA recognizes and provides a safe harbor for creditors who may file proofs of claim that are time-barred, if those filings arose from a good-faith belief resulting from a recording error that the statute of limitations had not in fact run on the claim. *See* 15 U.S.C. § 1692k(c).

may be read to coexist, the Code does not preclude an FDCPA claim in the bankruptcy context.

IV.

This dispute reveals no irreconcilable conflict between the Bankruptcy Code and the FDCPA. A creditor may file a proof of claim in a Chapter 13 bankruptcy proceeding under the Code. However, when that creditor is also a "debt collector" as defined by the FDCPA, the creditor may be liable under the FDCPA for "misleading" or "unfair" practices when it files a proof of claim on a debt that it knows to be time-barred, and in doing so "creates the misleading impression to the debtor that the debt collector can legally enforce the debt." *Crawford*, 758 F.3d at 1261. Because the Debtors' FDCPA claims are not precluded by the Bankruptcy Code, we reverse and remand to the District Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-11240-EE

ALEIDA JOHNSON, f.k.a. Aleida Hill, individually and on behalf of all similarly situated individuals,
Plaintiff-Appellant,

v.

MIDLAND FUNDING, LLC, Defendant-Appellee.

Filed: August 19, 2016

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, MARTIN and HIGGINBOTHAM*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are **DENIED** and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

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*Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are **DENIED**.

ENTERED FOR THE COURT:

/s/ Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 14-0322-WS-C

ALEIDA Q. JOHNSON, etc.,
Plaintiff,

v.

MIDLAND FUNDING, LLC, Defendant.

Signed: March 23, 2015

ORDER

WILLIAM H. STEELE, Chief Judge.

This matter is before the Court on the defendant's motion to dismiss. (Doc. 17). The parties have filed briefs in support of their respective positions, (Docs. 17, 21, 22, 25, 27), and the motion is ripe for resolution. After careful consideration, the Court concludes the motion is due to be granted.

BACKGROUND

According to the complaint, (Doc. 1), the plaintiff filed for bankruptcy relief under Chapter 13. The defendant

then filed a proof of claim that disclosed on its face that the claim is barred by the statute of limitations. The complaint alleges that this filing violated the Fair Debt Collection Practices Act ("the Act"), in that it was deceptive and misleading for purposes of 15 U.S.C. § 1692e and unfair and unconscionable for purposes of 15 U.S.C. § 1692f.

In *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), the Eleventh Circuit "consider[ed] whether a proof of claim to collect a stale debt in Chapter 13 bankruptcy violates" the Act and "answer[ed] this question affirmatively." *Id.* at 1256-57. The defendant argues that dismissal nevertheless is required on two grounds: (1) "[a]ny claim Johnson might otherwise assert under the [Act] in this case is precluded by the Bankruptcy Code"; and (2) "[e]ven if Johnson's claim were not precluded by the Bankruptcy Code, she still fails to state a claim under the [Act]." (Doc. 17 at 5, 16).

DISCUSSION

"There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment." *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995). The Court's review on this motion to dismiss is similarly limited to those arguments the parties have expressly advanced. *E.g., Jurich v. Compass Marine, Inc.*, 906 F. Supp. 2d 1225, 1228 (S.D. Ala. 2012).

The defendant's second argument is essentially an extended and futile effort to deny and thereby avoid the ruling in *Crawford*. The only serious question presented by the defendant's motion is whether tension between the Bankruptcy Code ("the Code") and the Act precludes

the plaintiff from pursuing her claim under the Act.[1] That issue was not presented in *Crawford*, and the Eleventh Circuit expressly declined to consider it. 758 F.3d at 1262.

"The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *accord J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 143-44 (2001). There are various ways of measuring and resolving the tension between federal statutes, but the parties agree to use the test requiring "irreconcilable conflict" between the provisions. (Doc. 17 at 4-5, 7, 16; Doc. 21 at 3, 7-12, 16, 18, 21; Doc. 22 at 1, 3, 7, 9).

Before deciding whether the Act and the Code are in irreconcilable conflict, the Court must determine what each provides. The Act, as construed by *Crawford*, provides that it is unlawful for a debt collector to file a proof of claim in a Chapter 13 proceeding knowing the claim to be time-barred.[2] As discussed below, the Code provides

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[1] Litigants and courts sometimes use the word "preemption" in describing such an issue. Preemption, however, is properly used when assessing the impact of a federal statute on a state law; preclusion is the correct term when two federal statutes are involved. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014).

[2] "Given our precedent, we must examine whether LVNV's conduct—filing and trying to enforce in court a claim known to be time-barred—would" violate the Act. 758 F.3d at 1259. "[W]e hold that LVNV's conduct violated the FDCPA's plain language . . . ." *Id.* at 1262.

that it is permissible for a creditor to file such a proof of claim if expiration of the limitations period does not extinguish the creditor's right to payment under applicable state law.

"A creditor . . . may file a proof of claim." 11 U.S.C. § 501(a). Pursuant to this provision, "[w]hen a debtor declares bankruptcy, each of its creditors is entitled to file a proof of claim . . . ." *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443, 449 (2007).

"In this title . . . 'claim' means . . . right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ." 11 U.S.C. § 101(5)(A). Thus, if a creditor has a right to payment he has a claim, and if he has a claim he is entitled to file a proof of claim.

"The basic federal rule in bankruptcy is that state law governs the substance of claims . . . ." *Travelers*, 549 U.S. at 450 (internal quotes omitted). This flows naturally from the proposition that "property interests are created and defined by state law, and unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* at 451 (internal quotes omitted). "Accordingly, when the Bankruptcy Code uses the word 'claim'—which the Code itself defines as a 'right to payment,' [citation omitted]—it is usually referring to a right to payment recognized under state law." *Id.* Thus, if a creditor has a right to payment (i.e., a property interest) recognized by applicable state law despite the

lapse of the limitations period, he has a claim for such time-barred debt and is entitled to file a proof of claim as to such time-barred debt.

The plaintiff identifies Alabama as providing the applicable state law. (Doc. 21 at 1 n. 1). In Alabama, a creditor's right to payment is not eliminated by a limitations bar. *Ex parte Liberty National Life Insurance Co.*, 825 So. 2d 758, 765 (Ala. 2007) ("[A] statute of limitations generally is procedural and extinguishes the remedy rather than the right .... ") (internal quotes omitted).[3] Thus, the defendant has a right to payment of its time-barred debt and a consequent entitlement to file a proof of claim as to the time-barred debt.

The plaintiff, while ignoring the Court's analysis, insists that the Code does not "condon[e] ... the filing of proofs of claim on patently unenforceable debt." (Doc. 21 at 8). According to the plaintiff, Section 101(5) requires a "*bona fide* 'right to payment,'" which she defines as a "legally enforceable right." (*Id.* at 2, 17).[4] The defendant

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[3] *Accord Ex parte HealthSouth Corp.*, 974 So. 2d 288, 296 (Ala. 2007) ("When the statute of limitations expires, it does not extinguish the cause of action; instead, it makes the remedy unavailable."); *Pinigis v. Regions Bank*, 942 So. 2d 841, 848 (Ala. 2006) ("The whole theory of a nonclaim statute is to create a defense broader in its operation than the statute of limitations, not only barring remedies, but extinguishing debts and liabilities.") (emphasis and internal quotes omitted).

[4] The plaintiff also argues that the Code "discourages" the filing of stale proofs of claim in that the claim form requires the claimant to declare under penalty of perjury that the debtor owes the creditor money and that the claim is warranted by existing law or a non-frivolous argument for its alteration, and in that the form warns that false claims can be penalized. (Doc. 21 at 17-18, 19). Even if the dis-

scoffs that the plaintiff has pulled this definition of a "right" from a legal dictionary. (Doc. 22 at 8). And so she has, but the Supreme Court itself, in construing Section 101(5), has declared that "[t]he plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation . . . ." *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 559 (1990).[5]

Mr. Black[6] provides seven definitions of a "right," but the plaintiff quotes only one part of one definition. The entirety of that (fourth) definition reads as follows: "A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong <a breach of duty that infringes one's right>." *Black's Law Dictionary* 1436 (9th ed. 2009). It is plain from this definition that "legally enforceable" means only that the law "recognize[s] and protect[s]" the interest giving rise to the claim, that is, that the claim is not a mere moral obligation or idiosyncratic opinion with which the law is not concerned. This dichotomy is made even clearer by Mr. Black's second definition, which defines a "right" as "[s]omething that is due to a person by just claim, legal guarantee, *or* moral

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couragement of a permitted practice had any relevance, these requirements do not discourage the filing of proofs of claim on time-barred debt like the plaintiff's since, as discussed above, under Alabama law a creditor is still owed the debt after the statute of limitations expires.

[5] *Accord Federal Communications Commission* v. *NextWave Personal Communications Inc.*, 537 U.S. 293, 302-03 (2003); *Cohen v. de la Cruz*, 523 U.S. 213, 218 (1998); *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991).

[6] Henry Campbell Black, father of the law dictionary bearing his name.

principle . . . . " *Id.* (emphasis added).[7] It is equally plain that a right is "legally enforceable" in this sense whether or not the defendant can successfully assert an affirmative defense such as the statute of limitations.[8] So long as the law recognizes and protects the interest at issue (here, the interest in being repaid a contractual debt), the resulting claim is legally enforceable even if the law's protection is not limitless in time or scope.

There is no indication that the Supreme Court has used the term "enforceable obligation" in any more restrictive sense than Mr. Black has used the parallel term "legally enforceable claim." The question presented in *Davenport* was whether restitution obligations imposed in state criminal proceedings are "debts" as defined by 11 U.S.C. § 101(11). Because "debt" means "liability on a claim," *id.*, the Court looked to the definition of "claim." The petitioners argued in part that a restitution order

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[7] Courts have often juxtaposed "moral" and "legally enforceable" obligations. *E.g., Kern v. Kern*, 360 So. 2d 482, 485 (Fla. App. 1978) ("Although a parent may suffer a moral obligation to assist children in acquiring an advanced education, we find nothing in either the jurisprudence or the statutes of this state which makes such a moral obligation legally enforceable."); *Koike v. Board of Water Supply*, 352 P.2d 835, 839 (Haw. 1960) ("The essence of a moral obligation is that it arises out of a state of facts appealing to a universal sense of justice and fairness, though, upon such facts no legally enforceable claim can be based."); *Bellamy v. Oklahoma Farm Mortgage Co.*, 278 S.W. 180, 182 (Tex. App. 1925) (nothing prevented the defendants from "convert[ing] into a legally enforceable obligation that which they were already morally bound to pay").

[8] As is generally true elsewhere, in Alabama the statute of limitations is an affirmative defense, not an element of the plaintiff's claim. *E.g., Special Assets, L.L.C. v. Chase Home Finance, L.L.C.*, 991 So. 2d 668, 675 (Ala. 2007).

could not represent a "right to payment" because the obligation could not be enforced in civil proceedings but only by threatening the probationer with revocation. 495 U.S. at 558-59. The Supreme Court did not regard this difference in "enforcement mechanism" as significant. *Id.* at 559-60. Its statement that a right to payment is "nothing more nor less than an enforceable obligation" signifies only that a right to payment is legally enforceable however the law chooses to enforce it—by civil litigation or otherwise. The *Davenport* Court's reliance on legislative history to show that the Code "contemplates that all *legal obligations* of the debtor . . . will be able to be dealt with in the bankruptcy case," *id.* at 558 (emphasis added, internal quotes omitted), further reflects that it used "enforceable obligation" only in Mr. Black's sense of an interest recognized and protected by law. Moreover, *Davenport* expressly recognizes that the Code's definitions of "claim" and "debt" are the "broadest possible," *id.* at 558, 564 (internal quotes omitted), and a definition of the embedded term "right to payment" that excludes obligations exposed to a limitations defense patently is not the broadest possible. Finally, to read *Davenport* as the plaintiff desires would directly contradict *Travelers'* pronouncement that the parameters of a right to payment are defined by state law, not federal law. In short, *Davenport* cannot plausibly be read for the proposition that a "right to payment" as contemplated by Section 101(5) ceases to exist the moment the statute of limitations expires.[9]

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[9] Nor do later Supreme Court cases quoting *Davenport's* "enforceable obligation" language support such a proposition. *NextWave* quoted *Davenport* only to support its conclusion that "a debt is a debt, even when the obligation to pay it is also a regulatory con-

There are yet other reasons to conclude that the Code permits a creditor to file a proof of claim knowing the claim is time-barred under Alabama or similar law. For example, Section 101(5) defines a claim to include a right to payment that is "contingent" or "unmatured." Even though the Code expressly recognizes that such claims are unenforceable (because no right to payment has yet ripened),[10] it includes them in the definition of a claim. That is, the Code expressly contemplates the filing of proofs of claim on presently unenforceable claims.[11]

This is underscored by the Code's procedure for addressing proofs of claim. If no party in interest objects, the claim is allowed as a matter of course. 11 U.S.C.

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dition." 537 U.S. at 302-03. *Cohen* quoted *Davenport* only to support its conclusion that "[a]n award of treble damages is an 'enforceable obligation' of the debtor, and the creditor has a corresponding 'right to payment.'" 523 U.S. at 218. *Johnson* quoted *Davenport* only to support its conclusion that "a mortgage interest that survives the discharge of a debtor's personal liability is a 'claim' within the terms of § 101(5)." 501 U.S. at 83.

The Eleventh Circuit appears to have quoted this portion of *Davenport* just once, in support of its conclusion that "a judgment requiring payment of punitive and compensatory damages for a common cause of fraudulent conduct is a 'debt' as defined by the Bankruptcy Code in § 523(a)." *In re: St. Laurent*, 991 F.2d 672, 679 (11th Cir. 1993). Nothing in *St. Laurent* suggests the restrictive definition proposed by the plaintiff.

[10] 11 U.S.C. § 502(b)(1) (upon objection, the Bankruptcy Court "shall allow such claim . . . except to the extent that [inter alia] such claim is unenforceable . . . for a reason other than because such claim is contingent or unmatured").

[11] *E.g., Bendall v. Lancer Management Group, LLC*, 523 Fed. Appx. 554, 558 (11th Cir. 2013) ("Contingent rights to payment need not be currently enforceable in order to constitute a claim.").

§ 502(a). The objections a party in interest may raise include that the "claim is unenforceable," *id.* § 502(b)(1), which would be unnecessary if proofs of claim on unenforceable claims were prohibited to begin with. Since one ground of unenforceability is the expiration of the limitations period,[12] the Code clearly contemplates the filing of proofs of claim on claims barred by the statute of limitations, with such claims to be allowed without objection or disallowed upon objection.

Finally, the plaintiff's restrictive definition of a claim is at odds with practice under the prior bankruptcy code, and she offers no sound basis for believing Congress rejected that practice when it enacted the Code. "In 1978, after almost 10 years of study and investigation, Congress enacted a comprehensive revision of the bankruptcy laws," known as the Bankruptcy Act of 1978. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Among the many changes worked by the 1978 revision was the adoption of the current definition of a "claim." *In re: Keeler*, 440 B.R. 354, 361 (Bankr. E.D. Pa. 2009). Previously, "a claim had to be both proved and allowed in order for a creditor to re-

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[12] "Section 502(b)(1) . . . is most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy." *Travelers*, 549 U.S. at 450. Legion are the cases disallowing claims under Section 502(b)(1) based on a limitations defense. Recent examples include *In re: Paterno*, 2015 WL 735919 (9th Cir. BAP 2015); *In re: Lewis*, 517 B.R. 615, 622 (Bankr. E.D. Va. 2014); and *In re: Archdiocese of Milwaukee*, 515 B.R. 579, 585-86 (Bankr. E.D. Wis. 2014); *In re: Mazyck*, 521 B.R. 726, 730-31 (Bankr. D.S.C. 2014); *In re: Washington*, 2014 WL 5714586 at *13 (Bankr. D.N.J. 2014); *In re: Morgan*, 2014 WL 5449491 at *2 (Bankr. E.D. Tenn. 2014).

ceive a distribution." *Id.*[13] Under the previous regime, "it has been held in a number of cases that a debt may be provable, even where the defense of the statute of limitations is good as against an action brought in the state courts . . . ." *In re: Kuffler*, 153 F. 667, 668 (E.D.N.Y. 1907); *accord Hargadine-McKittrick Dry Goods Co. v. Hudson*, 122 F. 232, 235 (8th Cir. 1903) ("Debts are not the less provable, within the meaning of the bankrupt act, because the statute of limitations may be successfully pleaded against their allowance."); *In re: Solomons*, 2 F. Supp. 572, 573 (S.D.N.Y. 1932) ("[T]he defense of the statute of limitations cannot be deemed properly to be an obstacle to the allowance [of a claim] unless it be interposed by some one . . . ."). The staleness of a debt did not affect its provability because "[t]he statute of limitations is a defense, and not a part of the affirmative claim." *In re: Kuffler*, 153 F. at 668. The debt was owed, and could thus be proved, even though ultimate allowance of the claim might be denied if the limitations defense were properly raised.

"We will not read the [1978] Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Davenport*, 495 U.S. at 563. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," and "[t]he Court has followed this rule with particular care in construing the scope of bankruptcy codifications." *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) (internal quotes omitted); *accord*

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[13] More precisely, the debt had to be proved and the claim on the debt allowed.

In re: St. Laurent, 991 F.2d 672, 679-80 (11th Cir. 1993). The plaintiff has identified nothing in Section 101(5) or its legislative history suggesting that Congress, in adopting the "broadest possible" definition of "claim," intended to overturn the longstanding rule that a limitations defense becomes relevant only after proofs of claim are filed, when the Bankruptcy Court (previously the referee) considers whether to allow an asserted claim. Any such argument would appear to be untenable.[14]

"Based upon the broad definition of a claim found in section 101(5)(A), and based upon the provisions of section 501, which affords all entities that hold claims the statutory entitlement to file a proof of claim, numerous courts have upheld the right of an entity to file a proof of claim, even if that claim is clearly barred by the applicable statute of limitations." *Keeler*, 440 B.R. at 363. For the reasons set forth above, the Court adds its voice to this chorus.[15]

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[14] Because the statute of limitations is an affirmative defense that is lost if not properly asserted, there is a sense in which a time-barred claim is legally enforceable when the proof of claim is filed, subject to becoming unenforceable only later, if and when the defense is raised. Under this view, filing a proof of claim on a time-barred claim would be proper under the Code even accepting the plaintiff's position that the claim must be enforceable when the proof of claim is filed. Because, as discussed in text, the Court rejects the plaintiff's position, it is unnecessary to consider this possibility.

[15] Other choristers include *United States v. Moriarty*, 8 F.3d 329, 334 (6th Cir. 1993) ("[U]sing the Bankruptcy Code's definition of the term 'claim' as a guide to interpret the term 'claim' in the federal priority statute, we conclude that the United States continues to have a 'right of payment,' and thus a 'claim,' against the debtor even though the United States is barred by the statute of limitations from bringing an action against the debtor for money damages."); *B-Real,*

In summary, except where expiration of the limitations period extinguishes the debt under applicable state law, the Code permits creditors to file proofs of claim in Chapter 13 proceedings on debts known to be time-barred, while the Act prohibits debt collectors from engaging in such conduct.[16] There is thus an obvious tension between the Act and the Code. The questions become whether that tension rises to the level of an irreconcilable conflict and, if so, how that conflict is to be resolved.

The answer to the second question is straightforward. "'Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict

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LLC v. Rogers, 405 B.R. 428, 431 (M.D. La. 2009) ("[T]he Bankruptcy Code itself contemplates a creditor filing a proof of claim on a time-barred debt and the Bankruptcy Court disallowing such claim after objection from the debtor."); *In re: Claudio*, 463 B.R. 190, 195 (Bankr. D. Mass. 2012) ("[A] proof of claim based on a stale claim will be deemed allowed under § 501(a) unless the affirmative defense is raised in a filed objection.") (internal quotes omitted); *In re: Andrews*, 394 B.R. 384, 388 (Bankr. E.D.N.C. 2008); *In re: Williams*, 392 B.R. 882, 886 (Bankr. M.D. Fla. 2008) ("The creditor's right to file a claim is not impacted by whether the statute of limitations has run...."); *In re: Varona*, 388 B.R. 705, 723-24 (Bankr. E.D. Va. 2008); and *In re: Simpson*, 2008 WL 4216317 at *2 (Bankr. N.D. Ala. 2008) ("The claims allowance process of the Bankruptcy Code contemplates that time-barred claims may be filed and expressly preserves the statute of limitations as a defense and a ground for disallowance of the claim.").

[16] A "creditor" is defined in pertinent part as "[an] entity that has a claim against the debtor." 11 U.S.C. § 101(10)(A). The plaintiff admits that the defendant purchased the subject debt, (Doc. 1 at 2), and the discussion in text establishes that the defendant has a "claim" despite the running of the limitations period. The defendant is thus a creditor under the Code.

constitutes an implied repeal of the other one.'" *EC Term of Years Trust v. United States*, 550 U.S. 429, 435 (2007) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). The Act has not been amended in any relevant respect since its 1977 enactment, while the Code dates from no earlier than 1978. Thus, and as the plaintiff acknowledges, in case of irreconcilable conflict the Act must yield to the Code.[17]

The first question requires more discussion. The plaintiff insists there is no irreconcilable conflict because the defendant "can easily comply with both the Bankruptcy Code and the [Act] by simply refraining from filing proofs of claim premised on time-barred debts." (Doc. 21 at 3; *accord id.* at 12 n.10, 16). The defendant argues that the two are in irreconcilable conflict "because [the Code] expressly prescribes the conduct allegedly prohibited by the [Act]." (Doc. 17 at 3).

The plaintiff relies for her position on *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). In *Randolph*, the defendant sent the debtor two dunning letters after the debtor's Chapter 13 petition had been filed and her

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[17] The Supreme Court has occasionally suggested that the later-enacted statute must or should also be the more specific statute. *E.g., Smith v. Robinson*, 468 U.S. 992, 1024 (1984). The parties do not invoke this line of authority and, in any event, the Code is plainly the more specific in the only respects relevant to this lawsuit. While the Code specifically addresses the filing of proofs of claim on stale debts, the provisions of the Act on which the plaintiff relies do not reference proofs of claim at all but merely prohibit in general terms the use of deceptive, misleading, unfair or unconscionable means of collecting debts.

plan confirmed.[18] The Act prohibits false representations that a debtor is required to pay a debt immediately, and it also prohibits writing the debtor directly when she is represented by counsel, while the Code prohibits debt-collection attempts in violation of the automatic stay. Although the defendant's conduct was thus prohibited under both regimes, the debtor's remedies were different, with the Act imposing liability on a strict-liability basis (subject to a due-care defense) and the Code restricting the recovery of damages to willful violations of the stay. *Id.* at 728-29. In this context, the Seventh Circuit ruled that the statutes were not in irreconcilable conflict because "it is easy to enforce both statutes, and any debt collector can comply with both simultaneously." *Id.* at 730; *see also id.* at 731 ("Overlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both.").

Randolph addresses the situation where both statutes impose obligations on a party.[19] In that context, it makes sense to frame the inquiry as whether the party can "comply" with both statutes, because each statute requires compliance with its corresponding obligation, and if the party can comply with its obligation under one statute only by failing to comply with its obligation under

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[18] Because the three consolidated appeals in *Randolph* were "similar in material respects," the Court "use[d] one as an illustration." 368 F.3d at 728.

[19] As does *Simon v. FIA Card Services, N.A.*, 732 F.3d 259, 279 (3rd Cir. 2013), which the plaintiff also cites in support of her position. (Doc. 21 at 12 n.10). And as do the dozen or so lower court decisions cited by the plaintiff as following *Randolph*—all of which involve obligations under the Act and under the Code's automatic stay and/or discharge injunction provisions. (*Id.* at 9-11).

the other, the obligations are in irreconcilable conflict. *E.g., Department of Transportation v. Public Citizen*, 541 U.S. 752, 766-67 (2004) ("If it were truly impossible for [the agency] to comply with both § 350 and § 13902(a)(1) [both of which imposed "mandates"], then we would be presented with an irreconcilable conflict of laws.").[20]

The ability to "comply" with both statutes, however, is not the proper test when, as here, the case does not concern a comparison of the obligations imposed by one statute with the obligations imposed by another but rather a comparison of the obligations imposed by one statute with the rights conferred by another. In such a case, to speak of mutual compliance is nonsensical, because one does not "comply" with a right, one exercises it. The plaintiff is not urging that the defendant "comply" with both the Act and the Code, she is insisting that the defendant comply with the Act by surrendering its right under the Code to file a proof of claim on a time-barred debt. This is not the vindication of both statutes, it is the negation of one by the enforcement of the other. A clearer demonstration of irreconcilable conflict would be difficult to imagine.[21]

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[20] *See also Simon*, 732 F.3d at 280 ("If, as the Simons argue, a § 1692e(11) claim could arise from the fact that the . . . letters and subpoenas did not include the 'mini-*Miranda*' notice, the [defendant] would violate the automatic stay provision of the Bankruptcy Code by including the notice or violate the [Act] by not including the notice. This conflict precludes allowing a claim under § 1692e(11) . . . .").

[21] Several sister courts in the Seventh Circuit, relying on *Randolph*, have determined that the Code does not preclude an action under the Act based on filing a proof of claim on a time-barred debt.

The plaintiff's other primary authority is *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014). In *POM Wonderful*, the label on the defendant's juice blend product prominently displayed the words "pomegranate blueberry" even though those juices represented only 0.5% of the product. The plaintiff sued under the Lanham Act for unfair competition in the form of a false or misleading product description. The defendant argued that the plaintiff's suit was precluded by the Food, Drug and Cosmetic Act ("FDCA"), the implementing regulations of which apparently permitted use of the label. *Id.* at 2233-34. The Supreme Court disagreed, ruling that the Lanham Act (which "protects commercial interests against unfair competition") and the FDCA (which "protects public health and safety") serve to "complement each other in the federal regulation of misleading labels." *Id.* at 2238, 2241. The plaintiff argues that the contradictory treatment by the Act and the Code of proofs of claim on stale debts does not show irreconcilable conflict because, as in *POM Wonderful*, the statutory schemes "serve two separate purposes." (Doc. 21 at 16).

The decision in *POM Wonderful* does not stand for the proposition that there can be no irreconcilable conflict between statutes when they serve different purpos-

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E.g., Patrick v. Pyod, LLC, 39 F. Supp. 3d 1032, 1034-35 (S.D. Ind. 2014); *In re: LaGrone*, 525 B.R. 419, 423-24 (Bankr. N.D. Ill. 2015); *In re: Brimmage*, 523 B.R. 134, 139 (Bankr. N.D. Ill. 2015); *Robinson v. eCast Settlement Corp.*, 2015 WL 494626 at *2 (N.D. Ill. 2015). These decisions generally rely on the defendant's ability to "comply" with the Code by declining to file a proof of claim. As set forth in text, the Court concludes that this is not a proper expression of the test for irreconcilable conflict in the present context. Nothing in these opinions undermines the Court's conclusion.

es. Nor could it, since it did not address the "high standard" of "irreconcilable conflict" to begin with but considered only how to "reconcile or harmonize" the two statutes. 134 S. Ct. at 2237.[22] Even ignoring this threshold difficulty, the plaintiff has not explained, and the Court cannot apprehend, how two mutually exclusive statutory provisions can be rendered compatible simply by noting that Congress had different purposes in mind when enacting them. Suppose one statute authorizes all citizens to wear white shirts and another forbids all citizens to wear white shirts. Can it seriously be contended that these provisions are reconcilable because the purpose of one is to promote good taste and the purpose of the other is to promote good health? The difference in purpose may explain why the conflict exists, but it does not remove the conflict.

It is of course true that legislative history may eliminate what would otherwise be an irreconcilable conflict by revealing an intent to restrict the meaning or scope of a facially clear statutory provision. *E.g.*, *Watt v. Alaska*, 451 U.S. 259, 266, 273 (1981) ("declin[ing] to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress" and finding from legislative history that Congress intended the new term "minerals," which "by its literal terms applies to the facts before us," to have a narrower meaning compatible with the existing statute). But the plaintiff has pointed to no indication that Congress intended the per-

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[22] The Supreme Court found it unnecessary to assess the existence vel non of irreconcilable conflict because the defendant could not prevail even under the lower standard. *Id.* The plaintiff's insistence that *POM Wonderful* was analyzed and decided under irreconcilable conflict principles, (Doc. 21 at 15), is simply incorrect.

mission it granted in the Code to file proofs of claim on stale debts to be qualified or withdrawn when the creditor is a debt collector. Simply pointing to *Randolph's* description of the Act as "regulating how debt collectors interact with debtors" and of the Code's "principal subjects" as "what assets are made available to which creditors and how much is left for debtors," 368 F.3d at 731—which is all the plaintiff offers, (Doc. 21 at 16)—reflects no congressional intent for the Code to mean something less than what it plainly says.

Statutory provisions are in irreconcilable conflict when "there is a positive repugnancy between them or . . . they cannot mutually coexist." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *accord J.E.M. Ag Supply*, 534 U.S. at 143. Thus, for example, when two different limitations periods purport to apply to the same situation, they are in irreconcilable conflict. *EC Term of Years Trust*, 550 U.S. at 435 ("We simply cannot reconcile the 9-month limitations period for a wrongful levy claim under § 7426(a)(1) with the notion that the same challenge would be open under § 1346(a)(1) for up to four years."). Here, as long as state law preserves a right to payment after the limitations period expires, the Code authorizes filing a proof of claim on a debt known to be stale, while the Act (as construed by *Crawford*) prohibits that precise practice. Because, as to creditors under the Code that are also debt collectors under the Act, those contradictory provisions cannot possibly be given effect simultaneously, the provisions are positively repugnant and cannot mutually coexist. They are thus in irreconcil-

able conflict.[23] And because there is irreconcilable conflict, the Act must give way to the Code.[24]

CONCLUSION

For the reasons set forth above, the defendant's motion to dismiss is **granted.** This action is **dismissed with prejudice.** Judgment shall be entered accordingly by separate order.

DONE and **ORDERED.**

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[23] In *United States v. Devall*, 704 F.2d 1513 (11th Cir. 1983), "[t]he Social Security Act's anti-assignment provision purport[ed] to prohibit the assignment of social security benefits with very limited exceptions, while the Bankruptcy Code purport[ed] to authorize direct income deductions from the Social Security Administration." *Id.* at 1515. Because "the conflict between the Bankruptcy Code and the Social Security Act is apparent and cannot be reconciled without limiting one to accommodate the other," the Court "conclude[d] that the provision of the later-enacted Bankruptcy Reform Act must prevail over the more general anti-assignment provision of the Social Security Act." *Id.* at 1515, 1518. The present situation parallels that in *Devall*, and with like result.

[24] The defendant has also cited and discussed authorities that, largely as a matter of policy, would preclude any action under the Act that so much as touches upon matters also addressed by the Code (such as the discharge injunction), and others that would permit actions on the periphery of bankruptcy but preclude those implicating conduct "inside" the bankruptcy system. Because the plaintiff's action is clearly barred due to the irreconcilable conflict between the specific provisions of the Act and Code at issue, the Court need not consider these more sweeping approaches.

APPENDIX D

11 U.S.C. 101(5)(A) provides in relevant part:

In this title the following definitions shall apply:

* * *

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; * * *.

11 U.S.C. 501(a) provides in relevant part:

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest. * * *

11 U.S.C. 502 provides in relevant part:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the

United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured; * * *.

11 U.S.C. 558 provides in relevant part:

The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

15 U.S.C. 1692e provides in relevant part:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. * * *

15 U.S.C. 1692f provides in relevant part:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law. * * *

Federal Rule of Bankruptcy Procedure 3001 provides in relevant part:

(a) Form and content

A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

* * *

(c) Supporting information

* * *

(3) Claim based on an open-end or revolving consumer credit agreement

(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.
* * *

Federal Rule of Bankruptcy Procedure 9011 provides in relevant part:

* * *

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated

below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. * * *

RECORD
AND
BRIEFS

No. 16-348

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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Cases:

Crawford v. *LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), cert. denied, 135 S. Ct. 1844 (2015) 2

Owens v. *LVNV Funding, LLC*, ___ F.3d ___, 2016 WL 4207965 (7th Cir. Aug. 10, 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016) 3

Simmons v. *Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010) 2

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Fair Debt Collection Practices Act, 15 U.S.C. 1692-1692p 1, 2

In the Supreme Court of the United States

No. 16-348

MIDLAND FUNDING, LLC, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

This is the extremely rare case in which both petitioner and respondent agree not only that the questions presented implicate clear circuit conflicts on important issues of federal law, but also that the case is an excellent vehicle for addressing those questions. See Resp. Br. 7. The Court should heed the mutual request from creditors and debtors to resolve the discord concerning whether a debtor can sue a creditor under the Fair Debt Collection Practices Act (FDCPA) for filing an accurate proof of claim for a time-barred debt in a bankruptcy proceeding.

This case is the optimal vehicle in which to provide the clarity creditors and debtors need, because it squarely presents both of the closely related legal questions necessary to resolve that recurring real-world question.

1. Respondent agrees with petitioner that there is a clear and intractable circuit conflict on each of the questions presented in this case: whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the FDCPA, and whether the Bankruptcy Code precludes such an application of the FDCPA. See Resp. Br. 2. As respondent acknowledges, the Eleventh Circuit's decision in this case and its previous decision in *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (2014), cert. denied, 135 S. Ct. 1844 (2015), conflict with decisions from the Second, Fourth, Seventh, Eighth, and Ninth Circuits addressing those questions. See Resp. Br. 2-6. Although respondent would characterize the Second Circuit's decision in *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93 (2010), as more directly implicating the Bankruptcy Code preclusion question than the FDCPA interpretation question, see Resp. Br. 5 & n.3, the fact that the court's reasoning in that case is amenable to either interpretation merely underscores the close relationship between the two questions, and conflicts, presented.

Respondent also agrees with petitioner that the questions presented are of exceptional legal and practical importance and are ripe for this Court's review. See Resp. Br. 3, 6-7 & n.5. Despite representing competing interests in bankruptcy and FDCPA proceedings, creditors and debtors alike thus recognize the urgent need for the Court's intervention to resolve the disuniformity among the lower courts on these significant questions.

2. In light of the parties' agreement that the questions presented here are "ideally addressed in tandem,"

Resp. Br. 7, the Court should grant review in this case. This is the only case in which both questions were unambiguously pressed in the court of appeals, passed upon by that court, and raised in the petition for a writ of certiorari. See Pet. 18; Resp. Br. 7-8.

As respondent notes, a petition for certiorari is also pending in *Owens* v. *LVNV Funding, LLC*, No. 16-315 (filed Aug. 26, 2016), which presents the first of the two questions presented in this case. The Court may wish to grant the petition for certiorari in *Owens* in addition to this one and consolidate the cases, though that approach would require realignment of the parties for purposes of briefing and oral argument. In that event, the respondents in *Owens* could advance the Bankruptcy Code preclusion argument as an alternative ground for affirmance, assuming that they adequately preserved that argument before the court of appeals. Cf. Resp. Br. 8. In the alternative, the Court may simply wish to hold the *Owens* petition pending resolution of both questions presented in this case. In either event, however, the petition for a writ of certiorari in this case should be granted.

Respectfully submitted.

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SEPTEMBER 2016

RECORD
AND
BRIEF

No. 16-348

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: SEPTEMBER 16, 2016
CERTIORARI GRANTED: OCTOBER 11, 2016

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The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear as appendices to the petition for certiorari as follows:

Appendix A:	Court of appeals opinion (May 24, 2016)
Appendix B:	Court of appeals order (Aug. 19, 2016)
Appendix C:	District court order (Mar. 23, 2015)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-11240

ALEIDA JOHNSON, f/k/a ALEIDA HILL,
Plaintiff-Appellant,

v.

MIDLAND FUNDING, LLC,
Defendant-Appellee

DOCKET ENTRIES

DATE	PROCEEDINGS
03/24/2015	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Aleida Johnson on 03/24/2015. Fee Status: Fee Paid. No hearings to be transcribed. The appellant's brief is due on or before 05/04/2015. The appendix is due no later than 7 days from the filing of the appellant's brief. Awaiting Appellant's CIP Due on 04/13/2015 as to Appellant Aleida Johnson.

* * * * *

DATE	PROCEEDINGS
07/10/2015	Appellant's brief filed by Aleida Johnson. (ECF: Daniel Geyser)
07/13/2015	Appendix filed [One VOLUMES] by Appellant Aleida Johnson. (ECF: Daniel Geyser).
	* * * * *
09/14/2015	Appellee's Brief filed by Appellee Midland Funding, LLC. (ECF: Jason Tompkins)
	* * * * *
10/27/2015	Supplemental Authority filed by Appellee Midland Funding, LLC. (ECF: Jason Tompkins)
10/30/2015	Reply Brief filed by Appellant Aleida Johnson. (ECF: Daniel Geyser)
	* * * * *
11/10/2015	Reply Brief filed by Appellant Aleida Johnson. Service 10/30/2015 email – Attorney for Appellees: Espy, Tompkins.
	* * * * *
04/13/2016	Oral argument held. Oral Argument participants were Daniel Luke Geyser for Appellant Aleida Johnson and Jason Brent Tompkins for Appellee Midland Funding, LLC in 15-11240, Daniel Luke Geyser for Appellants Judy N. Brock and Donald Cunningham and Derek Wayne Edwards for Appellees LVNV

DATE	PROCEEDINGS
	Funding, LLC and Resurgent Capital Services, L.P. in 15-14116. [15-11240, 15-14116]
	* * * * *
04/29/2016	Supplemental Authority filed by Appellee Midland Funding, LLC. (ECF: Jason Tompkins)
05/13/2016	Supplemental Authority filed by Appellant Aleida Johnson. (ECF: Daniel Geyser)
05/24/2016	Judgment entered as to Appellant Aleida Johnson in 15-11240, Appellants Judy N. Brock and Donald Cunningham in 15-14116. [15-11240, 15-14116]
05/24/2016	Opinion issued by court as to Appellants Judy N. Brock and Donald Cunningham in 15-14116. Decision: Reversed and Remanded. Opinion type: Published. Opinion method: Signed. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions. [15-11240, 15-14116]
05/24/2016	Judgment entered as to Appellant Aleida Johnson.
	* * * * *
06/28/2016	CORRECTED Petition for rehearing en banc (with panel rehearing) filed by Appellee Midland Funding, LLC. (ECF:

DATE	PROCEEDINGS
	Jason Tompkins)
07/11/2016	Supplemental Authority in Support of Rehearing filed by Appellee Midland Funding, LLC. (ECF: Jason Tompkins)
08/12/2016	Supplemental Authority in Support of Rehearing filed by Appellee Midland Funding, LLC. (ECF: Jason Tompkins)
08/12/2016	Supplemental Authority in Support of Rehearing filed by Appellee Midland Funding, LLC. (ECF: Jason Tompkins)
08/19/2016	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellee Midland Funding, LLC are DENIED. [7887134-1]
	* * * * *
09/16/2016	Notice of Writ of Certiorari filed as to Appellant Aleida Johnson. SC# 16-348.
09/19/2016	Mandate issued as to Appellant Aleida Johnson.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA (MOBILE)

No. 1:14-cv-00322-WS-C

ALEIDA JOHNSON, f/k/a Aleida Hill, individually and on behalf of all similarly situated individuals, Plaintiff,

v.

MIDLAND FUNDING LLC, MIDLAND CREDIT MANAGEMENT, INC. & ENCORE CAPITAL GROUP, INC., Defendants

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DOCKET ENTRIES

DATE	#	PROCEEDINGS
07/14/2014	1	COMPLAINT against Midland Funding LLC (Filing fee $400 receipt number 1128-1607453, Online Credit Card Payment), filed by Aleida Johnson. (Attachments: # 1 Exhibit 1 - Midland Funding Claim No. 5) (Underwood, Earl) (Additional attachment(s) added on 7/15/2014: # 2 Civil Cover Sheet) (eec). (Entered: 07/14/2014)

* * * * *

10/07/2014	17	MOTION to Dismiss by Midland Funding LLC. (Tompkins, Jason) (Entered: 10/07/2014)
		* * * * *
11/04/2014	21	RESPONSE to Motion re: 17 MOTION to Dismiss filed by Aleida Johnson. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3) (Riemer, Kenneth) (Entered: 11/04/2014)
		* * * * *
11/12/2014	22	REPLY to Response to Motion 17 *Defendant's Reply in Support of Motion to Dismiss* filed by Midland Funding LLC. (Tompkins, Jason) (Entered: 11/12/2014)
		* * * * *
03/24/2015	28	ORDER granting 17 Motion to Dismiss. This action is dismissed with prejudice. Judgment shall be entered by separate order. Signed by Chief Judge William H. Steele on 3/23/2015. (mbp) (Entered: 03/24/2015)
		* * * * *
03/24/2015	30	JUDGMENT in favor of Midland Funding LLC against Aleida Johnson. Signed by Chief Judge William H. Steele on 3/23/2015. (mbp) (Entered: 03/24/2015)
03/24/2015	31	NOTICE OF APPEAL as to 30 Judgment. 28 Order on Motion to

Dismiss by Aleida Johnson (Filing fee $505 receipt number 1128-1716734, Online Credit Card Payment.) (Underwood, Earl) (Entered: 03/24/2015)

* * * * *

05/24/2016 36 OPINION of USCA as to 31 Notice of Appeal filed by Aleida Johnson, REVERSED AND REMANDED. (Mandate to issue at a later date.) ref. Judge Steele (jal) (Entered: 05/24/2016)

* * * * *

09/23/2016 40 MOTION for Leave to File *Amended Complaint* by Aleida Johnson. (Attachments: # 1 Amended Complaint) (Riemer, Kenneth) (Entered: 09/23/2016)

* * * * *

09/30/2016 43 RESPONSE TO 40 MOTION for Leave to File *Amended Complaint* filed by Midland Funding LLC. (Tompkins, Jason) (Entered: 09/30/2016)

* * * * *

10/03/2016 44 ORDER granting 40 Motion for Leave to File an amended complaint. The plaintiff is to file and serve her amended complaint by 10/10/16. The defendant is to file its response by 10/24/16. Signed by Chief Judge Wil-

liam H. Steele on 10/3/2016. (mbp) (Entered: 10/03/2016)

10/10/2016 45 AMENDED COMPLAINT against All Defendants, filed by Aleida Johnson. (Attachments: # 1 Exhibit 1) (Riemer, Kenneth) (Entered: 10/10/2016)

10/13/2016 46 Unopposed MOTION to Stay by Midland Funding LLC. (Tompkins, Jason) (Entered: 10/13/2016)

* * * * *

10/18/2016 48 Order granting 46 Unopposed MOTION to Stay filed by Midland Funding LLC. This stay will expire at the close of business on 6/30/2017. Signed by Chief Judge William H. Steele on 10/18/2016. (tgw) (Entered: 10/18/2016)

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA (MOBILE)

No. 14-00917

In re: ALEIDA QUWANNA JOHNSON, a/k/a Aleida Johnson, a/k/a/ Aleida Q. Hill, a/k/a/ Aleida Hill, a/k/a Aleida Quwanna Hill, Debtor I

DOCKET ENTRIES

DATE	#	PROCEEDINGS
03/24/2014	1	Chapter 13 Voluntary Petition, All Schedules and Statements Fee Amount $281 (Case Upload) filed by James D. Patterson on behalf of Aleida Quwanna Johnson. (Patterson, James) (Entered: 03/24/2014)
03/24/2014	2	Chapter 13 Plan Filed by on behalf of Aleida Quwanna Johnson (Patterson, James) (Entered: 03/24/2014)
		* * * * *
05/30/2014	16	NEGATIVE NOTICE: Objection to Claim Number 5 by Claimant Midland Funding LLCC. (Patterson, James) Objections due by 6/30/2014. (Entered: 05/30/2014)
		* * * * *

07/11/2014	22	Order Granting Objection to Claim Number 5 by Claimant Midland Funding LLC.(Related Doc # 16) Signed on 7/11/2014 (TAW) (Entered: 07/11/2014)
		* * * * *
09/15/2014	42	Order Confirming Chapter 13 Plan (Chapter 13 Trustee (Auto-File)) (Entered: 09/15/2014)
		* * * * *
06/10/2015	55	NEGATIVE NOTICE Trustee's Motion to Dismiss Case *with a 90 day injunction* Objections to Trustee Motion to Dismiss due by 7/1/2015. (Chapter 13 Trustee (Auto-File)) (Entered: 06/10/2015)
		* * * * *
06/22/2015	58	Consent Order Conditionally Denying Trustee's Motion to Dismiss. (Related Doc # 55) Signed on 6/22/2015. (Todd, D) (Entered: 06/22/2015)
		* * * * *
05/12/2016	62	Order Dismissing Chapter 13 Case. Dismissed for failure to Comply with Consent Order. Signed on 5/12/2016 (related document(s) 58 Order on Trustee's Motion to Dismiss Case (batch)) (TAW) (Entered: 05/12/2016)

* * * * *

05/17/2016	65	Motion to Reinstate a Dismissed Case Filed by James D. Patterson of Underwood & Riemer, PC on behalf of Aleida Quwanna Johnson. (Patterson, James) (Entered: 05/17/2016)

* * * * *

06/21/2016	70	Order Conditionally-Granting Motion To Reinstate a Dismissed Case. The Debtor will resume making plan payments of $466.00 per month. (Related Doc # 65) Signed on 6/21/2016. (TAW) (Entered: 06/21/2016)

* * * * *

B 10 (Official Form 10) (12/12) Chapter 13

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF ALABAMA		PROOF OF CLAIM
Name of Debtor: ALEIDA HILL	Case Number: 14-00917	
NOTE: Do not use this form *to make a claim for an administrative expense arising after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*		
Name of Creditor (The person or other entity to whom the debtor owes money or property): MIDLAND FUNDING LLC		**COURT USE ONLY**
Name and address where notices should be sent: Midland Credit Management, Inc. as agent for MIDLAND FUNDING LLC PO Box 2011 Warren, MI 48090 Telephone number: (877) 495-2902 Fax: (866) 818-1718 email: MBX_ILMS_Bankruptcy@MCMCG.com		❑ Check this box to indicate that this claim amends a previously filed claim **Court Claim Number:** _____ *(If known)* Filed on: _____
Name and address where payments should be sent (if different from above): Telephone Number: email		❑ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

1. Amount of claim as of Date Case Filed: $1,879.71 If all or part of your claim is secured, complete item 4. If all or part of your claim is entitled to priority, complete item 5. ❑ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		
2. Basis for Claim: Revolving Credit/Services Rendered (See instruction #2.)		
3. Last four digits of any number by which creditor identifies debtor: [REDACTED]	3a. Debtor may have scheduled account as FINGERHUT CREDIT ADVANTAGE (See instruction #3a.)	3b. Uniform Claim Identifier (optional) _____ (See instruction #3b.)
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a settoff and provide the requested information. **Nature of property or right of setoff:** ❑ Real Estate ❑ Motor Vehicle ❑ Other (Judgement Lien) **Describe:** **Value of Property: $**_____ **Annual Interest Rate:** ____% **❑ Fixed ❑ Variable (when case was filed)**		Amount of arrearage and other charges as of time case filed included in secured claim, if any: $_____ Basis for perfection: _____ Amount of Secured Claim: $ _____ Amount unsecured: $ _____
5.Amount of Claim Entitled to Priority under 11 U.S.C. §.507(a). If any portion of your claim falls in one of the following cate-		

gories, check the box and state the amount.

❑ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B)

❑ Wages, salaries, or commissions (upto $12,475*) earned within 180 days before case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507(a)(4)

❑ Contributions to an employee benefit plan – 11 U.S.C. §507(a)(5)

❑ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507(a)(7)

❑ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8)

❑Other – Specify applicable paragraph of 11 U.S.C. §507(a)(_)

Amount entitled to priority

$ _____

**Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (see instruction #6)

7. **Documents:** Attach **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and redated copies of the documents providing evidence of perfection of a security interest is attached. (See instruction #7, and the definition of "redacted".)
DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. **Signature:** (See instruction #8)
Check the appropriate box.

❑ I am the creditor	☒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)
❑ I am the trustee, or debtor, or their authorized agent. (See Bankruptcy Rule 3004.)	❑ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005).

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Heather Lynch

Title: Bankruptcy Specialist

Company: Midland Credit Management, Inc.

/s/ Heather Lynch 06/29/2014

(Signature) (Date)

Address and telephone number (if different from notice address above):

Telephone number: email:

Penalty for presenting a fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number: Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy	**4. Secured Claim:** Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions) If the claim is secured, check the box for the nature and value of the property that secures the claim, attach copies

court, all of this information is at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person s who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs form the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as a Date Case Filed:

State the total amount owed to the creditor on the date of bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to

of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate *(and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).

If any portion of the claim falles into any category shown, check the appropriate box(es) and stat the amount entitled to priority. (See Definitions) A claim may be partily piority and partly non-priority. For example, in some categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim services as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open and end or revolving consumer credit agreement or secured by a se-

provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24 character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

curity interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves FRBP 3001(c) and (d) if the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirement of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs form the address given on the top of the form for

	purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name and individual filing the claim and the name of the agent. If the authorized agent is a service, identify the corporate services as the company. Criminal penalties apply for making a false statement on a proof of claim.

ACCOUNT(S) SUMMARY

ACCOUNT INFORMATION:

ACCOUNT HOLDER(S) ALEIDA HILL		**CURRENT CREDITOR** Midland Funding LLC		
ORIGINAL CREDITOR NAME FINGERHUT CREDIT ADVANTAGE		**ORIGINAL CREDITOR ACCOUNT NO** [REDACTED]	**ASSIGNOR** (if other than original creditor) JEFFERSON CAPITAL SYSTEMS LLC	
TOTAL CLAIM AMOUNT $1,879.71	**UNSECURED PRINCIPAL** $1,879.71	**INTEREST DUE** $0.00	**FEES** $0.00	**COSTS** $0.00
DATE OF LAST TRANSACTION 05/28/2003	**CREDITOR AT DATE OF LAST TRANSACTION** FINGERHUT CREDIT ADVANTAGE	**CHARGE-OFF DATE** 01/05/2004	**DATE OF LAST PAYMENT** 05/28/2003	

NOTICE AND PAYMENT INFORMATION:

ADDRESS	PHONE/FAX	EMAIL	REFERENCE NUMBER
P.O. BOX 2011 WARREN MI 48090	(877) 495-2902 (866) 818-1718	MBX_ILMS_ Bankruptcy@ MCMCG.com	14-409326

IN THE UNITED STATES BANKRUPTCY COURT
OF THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 14-00917 WSS
Chapter 13

In re: ALEIDA QUWANNA JOHNSON, Debtor(s)

OBJECTION TO CLAIM

NOTICE OF OPPORTUNITY TO OBJECT AND FOR HEARING

Pursuant to Local Standing Order, the Court will consider this motion, objection, or other matter without further notice or hearing unless a party in interest files a written objection within thirty (30) days from the date of service of this paper. If you object to the relief requested in this paper, you must file a written objection stating the specific ground or grounds on which your objection is based with the Clerk of the Court at 201 St. Louis Street, Mobile, Alabama 36602, and serve a copy on the movant's attorney, James D. Patterson, 166 Government St., Suite 100, Mobile, AL 36602.

If you file and service a written objection stating the specific ground or grounds on which your objection is based within the time permitted, the Court will schedule a hearing and you will be notified. IF YOU DO NOT FILE A PROPER WRITTEN OBJECTION WITHIN THE TIME PERMITTED, THE COURT WILL CONSIDER THAT YOU DO NOT OPPOSE THE GRANT-

ING OF THE RELIEF REQUESTED IN THE PAPER, WILL PROCEED TO CONSIDER THE PAPER WITHOUT FURTHER NOTICE OR HEARING, AND MAY GRANT THE RELIEF REQUESTED.

COME NOW the Debtor(s) Aleida Quwanna Johnson, in the above styled matter, by and through their attorney, and object to the following claim:

Creditor	Claim No.	Amount	Specific Basis for Objection
Midland Funding LLC	5	$1,879.71	Claim does not contain supporting documentation.

Wherefore, Debtor(s) request that after notice and hearing, the unsecured general claim be reduced to $0.00.

/s/ James D. Patterson
James D. Patterson, Esq.
Underwood & Riemer, PC
166 Government Street, Suite 100
Mobile, Alabama 36602
Telephone: (251) 432-9212
jpatterson@alalaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th of May, 2014, I have served a true and correct copy of the foregoing upon John C. McAleer, III, Chapter 13 Trustee, and the following via electronic service or by placing a copy of same in the United States Mail, first class prepaid to the following:

Midland Funding LLC
P O Box 2011
Warren, MI 48090

/s/ James D. Patterson
James D. Patterson, Esq.

IN THE UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 14-00322

ALEDIA Q. JOHNSON, a/k/a ALEDIA HILL, individually and on behalf of a class of others similarly situated, Plaintiff,

v.

MIDLAND FUNDING, LLC, Defendant

CLASS ACTION COMPLAINT

COMES NOW the Plaintiff, Aledia Johnson (hereafter the "Plaintiff") by counsel, and asserts her claims against the above named Defendants as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 because the complaint contains claims that arise under the laws of the United States.

2. Venue is proper in this District because the acts and transactions occurred here and all the parties reside or transact business here.

PRELIMINARY STATEMENT

3. This is an action for actual damages, statutory damages, costs and attorney's fees brought pursuant to

the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 ("FDCPA"). Plaintiff brings this action individually and on behalf of all others similarly situated to recover damages by reason of the Defendant's violations of the FDCPA. The violating actions addressed in this Complaint stem from attempts to collect a time barred debt by filing a proof of claim form in Plaintiff's Chapter 13 bankruptcy case.

PARTIES

5. Plaintiff is a natural person and adult resident of Mobile County, Alabama. She is a "Consumer" as defined by 15 U.S.C. § 1692a(3).

6. Defendant MIDLAND FUNDING, LLC, ("Midland") does business within the State of Alabama.

7. Midland, according to its website, is one of the nation's biggest buyers of unpaid debt.[1] Midland purchases accounts with an unpaid balance where consumers have gone at least 180 days without making a payment, or paid less than the minimum monthly payment.

8. Midland is regularly engaged in the practice debt collection.

9. The defendant sends collection letters and places collection calls as a regular part of its business.

10. Defendant is debt a collector as defined by the FDCPA.

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[1] See http://www.midlandcreditonline.com/who-is-mcm/midland-funding-llc/

FACTUAL ALLEGATIONS

11. Plaintiff, on March 24, 2014, filed for relief under Chapter 13 of Title 11 U.S. Code in the Bankruptcy Court for the Southern District of Alabama, Case Number 14-00917.

12. The Defendant, on or about May 29, 2014, filed a proof of claim against her in her bankruptcy case seeking to collect the sum of $1,879.71.

13. The claim, attached as Exhibit One, states the original creditor is "Fingerhut Credit Advantage" and that the date of the last transaction on the account was stated as May 28, 2003.

14. No documentation was attached to the claim.

15. The claim is, on its face, barred by the applicable statute of limitations.

16. The filing of such a claim is an attempt to collect a time barred debt and a violation of at least Sections 1692e and 1692f of the FDCPA because it is "unfair," unconscionable," deceptive," and misleading.

COUNT I
(FDCPA VIOLATION)

17. Plaintiff realleges and incorporates all of the preceding paragraphs as if fully set out herein.

18. As a result of its violations of the FDCPA, Midland is liable to Plaintiff for actual and statutory damages, plus costs and attorney's fees.

WHEREFORE, Plaintiff respectfully requests that judgment be entered against Defendant for the following:

A. Actual and statutory damages pursuant to 15 U.S.C. § 1692k;

B. Costs and reasonable attorney's fees pursuant to 15 U.S.C. § 1692k; and

C. Such other and further relief as this Court deems just and proper, the premises considered.

COUNT II
(CLASS ACTION ALLEGATIONS)

19. Plaintiff realleges and adopts all of the relevant foregoing paragraphs contained in this complaint.

20. Plaintiff prays that this court will certify this action as a class action as provided by Federal Rules of Civil Procedure, Rule 23, and realleges and incorporates by reference the allegations and counts of complaint on behalf of all those persons hereinafter described belonging to the class or any sub-class therein.

21. Plaintiff brings this action on behalf of himself and all members of a class defined as all consumers in the United States who:

a. Filed for relief under chapter 13 of title 11 U.S. Code; and

b. The defendant filed one or more claims, as that term is used in 11 U.S.C. § 501, in connection with debts whose collection was barred by the applicable limitations period;

c. Within a period, beginning one year prior to the filing of the original complaint through the date of the certification of a class herein.

22. The class is so numerous, that joinder of all members is impractical. Plaintiff further avers that

there are questions of law or fact common to the class relating to the conduct of the defendant regarding said claims. Plaintiff further avers that their claims or defenses, as representative of the class, are typical of the class. Plaintiff further avers that in a representative capacity she will fairly and adequately protect the interest of the class.

23. Each class member has, or has been subjected to collection activity in violation of the FDCPA because the defendant has or attempted to collect a time barred debt from class members.

24. Names and addresses of class members are presently unknown to plaintiff, but can be readily ascertained from the defendant's business records.

25. Common or similar issues of law and fact predominate over individual issues. These common issues include, but are not limited to the following:

a. Whether Midland violated the FDCPA by filing a Proof of Claim related to a time barred debt;

b. What is the appropriate remedy for Midland's violation of the FDCPA?

26. Proof of common facts and legal doctrines by the representative plaintiff will determine the claims of each member of the class.

27. This class action proceeding will provide a practical basis for the determination of all interest of the parties, prevent inconsistent adjudications, maximize judicial economy, and is superior to all other available methods of fair and efficient adjudications of the controversy.

28. The named representative's claims are typical and representative of the class.

29. It is and was the practice of Defendant to attempt debt collection that was in violation of the FDCPA as stated in the above.

WHEREFORE, Plaintiff prays that this court will certify this as a class action, and award the members of the class herein the remedies provided for in 15 U.S.C. § 1692k(a)(2)(B).

Respectfully Submitted,

/s/ Earl P. Underwood, Jr.

Earl P. Underwood, Jr. (UNDEE6591)
Underwood & Riemer, P.C.
21 South Section Street
Fairhope, AL 365832
Telephone: 251-990-5558
Email: epunderwood@alalaw.com

PLAINTIFF DEMANDS A TRIAL BY JURY IN THIS MATTER.

/s/ Earl P. Underwood, Jr.
Earl P. Underwood, Jr. (UNDEE6591)

DEFENDANT WILL BE SERVED BY CERTIFIED MAIL AT:

CSC LAWYERS INCORPORATING SRV INC	
Registered Office Street Address	150 S PERRY ST MONTGOMERY, AL 36104

ECORD
AND
BRIEF

No. 16-348

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

JASON B. TOMPKINS
CHASE T. ESPY
BALCH & BINGHAM LLP
1901 Sixth Avenue North,
Suite 1500
Birmingham, AL 35203

KANNON K. SHANMUGAM
Counsel of Record
ALLISON JONES RUSHING
MASHA G. HANSFORD
KATHERINE A. PETTI
WILLIAM T. MARKS
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTIONS PRESENTED

1. Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act.

2. Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.

CORPORATE DISCLOSURE STATEMENT

Petitioner Midland Funding, LLC, is a subsidiary of Encore Capital Group, Inc., a publicly held company. Encore Capital Group has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Alabama ex rel. Ohio, Ex parte, 718 So. 2d 669 (Ala. 1998) 17

American Bank & Trust Co. v. *Dallas County*, 463 U.S. 855 (1983) 40

Armstrong v. *Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015) 43

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 29

Bessette v. *Avco Financial Services, Inc.*, 230 F.3d 439 (1st Cir. 2000), cert. denied, 532 U.S. 1048 (2001) 42

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Bravo v. *Midland Credit Management, Inc.*, 812 F.3d 599 (7th Cir. 2016) 29

Bryant v. *Swofford Brothers Dry Goods*, 214 U.S. 279 (1909) 21

Butner v. *United States*, 440 U.S. 48 (1979) 17, 21

Camp, In re, 78 B.R. 58 (Bankr. E.D. Pa. 1987) 18

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Cases—continued:

Cohen v. *de la Cruz*, 523 U.S. 213 (1998) 22
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Greene v. *Taylor*, 132 U.S. 415 (1889) 33
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Heintz v. *Jenkins*, 514 U.S. 291 (1995) 44
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Liberty National Life Insurance, Ex parte, 825 So. 2d 758 (Ala. 2002) 17
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Nelson v. *Midland Credit Management, Inc.*, 828 F.3d 749 (8th Cir. 2016) 26
Oliver v. *Dudley*, 109 So. 2d 668 (Ala. 1959) 17
Owens v. *LVNV Funding, LLC*, 832 F.3d 726 (7th Cir. 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016) 16, 25, 26, 34
Pennsylvania Department of Public Welfare v. *Davenport*, 495 U.S. 552 (1990) 16, 21, 22, 24
Peters v. *General Service Bureau, Inc.*, 277 F.3d 1051 (8th Cir. 2002) 29
Posadas v. *National City Bank*, 296 U.S. 497 (1936) 38, 43
Powers v. *Credit Management Services, Inc.*, 776 F.3d 567 (8th Cir. 2015) 29
Raleigh v. *Illinois Department of Revenue*, 530 U.S. 15 (2000) 17
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Semtek International Inc. v. *Lockheed Martin Corp.*, 531 U.S. 497 (2001) 17
Shepherd v. *Thompson*, 122 U.S. 231 (1887) 19
Sheriff v. *Gillie*, 136 S. Ct. 1594 (2016) ..... *passim*
Spokeo, Inc. v. *Robins*, 136 S. Ct. 1540 (2016) 36
Stellwagen v. *Clum*, 245 U.S. 605 (1918) 41
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 43
Travelers Casualty & Surety Co. v. *Pacific Gas & Electric Co.*, 549 U.S. 443 (2007) ..... *passim*
United States v. *Estate of Romani*, 523 U.S. 517 (1998) 38, 42
United States v. *Fausto*, 484 U.S. 439 (1988) 43

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Cases—continued:

Universal Interpretive Shuttle Corp. v. *Washington Metropolitan Area Transit Commission*, 393 U.S. 186 (1968) 43
Walls v. *Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002) 42
West Virginia University Hospitals, Inc. v. *Casey*, 499 U.S. 83 (1991) 39

Constitution, statutes, and rules:

U.S. Const. Art. I, § 8, cl. 4 41
Bankruptcy Act of 1898, ch. 541, § 63(a), Pub. L. No. 55-541, 30 Stat. 562-563 45
11 U.S.C. 103 (1976) 45
Bankruptcy Code, 11 U.S.C. 101-1532 ..... *passim*
11 U.S.C. 101(5)(A) 4, 16, 18, 28
11 U.S.C. 101(10)(A) 16, 44
11 U.S.C. 101(12) 24
11 U.S.C. 105(a) 6, 32, 42
11 U.S.C. 107(a) 33
11 U.S.C. 301 ..... *passim*
11 U.S.C. 362(a)(6) 5, 23, 32
11 U.S.C. 501 4
11 U.S.C. 501(a) 16, 44
11 U.S.C. 501(c) 35
11 U.S.C. 502(a) ..... *passim*
11 U.S.C. 502(b) 5, 30
11 U.S.C. 502(b)(1) 5, 19, 20
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11 U.S.C. 502(e) 19
11 U.S.C. 521(a)(1)(A) 3
11 U.S.C. 521(a)(1)(B)(i) 3
11 U.S.C. 523(a)(3) 5
11 U.S.C. 523(a)(3)(A) 35
11 U.S.C. 524(a) 6, 33
11 U.S.C. 524(a)(2) 24
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Statutes and rules—continued:

11 U.S.C. 541(a) 3
11 U.S.C. 558 ..... 5, 19, 20
11 U.S.C. 704(a)(5) 4, 19, 30
11 U.S.C. 726(a) 29, 32
11 U.S.C. 727(b) 5, 24
11 U.S.C. 1302(b)(1) 4, 19, 30
11 U.S.C. 1328(a) 24
11 U.S.C. 1328(c)(2) 35
Consumer Credit Protection Act,
Pub. L. No. 90-321, 82 Stat. 146 (1968) 40, 41
Fair Debt Collection Practices Act, 15 U.S.C.
1692-1692p ..... *passim*
15 U.S.C. 1692(a) 6, 36, 41
15 U.S.C. 1692(b) 36
15 U.S.C. 1692(e) 6, 36, 37
15 U.S.C. 1692a(3) 36
15 U.S.C. 1692a(6) 6
15 U.S.C. 1692c(b) 33
15 U.S.C. 1692e ..... *passim*
15 U.S.C. 1692e(2)(A) 28
15 U.S.C. 1692f ..... *passim*
15 U.S.C. 1692f(7) 33
15 U.S.C. 1692f(8) 33
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15 U.S.C. 1692k(a)(2) 7
15 U.S.C. 1692n 42
Fed. R. Bankr. P. 3001 ..... *passim*
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Fed. R. Bankr. P. 3001(c)(2)(D) 20
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Fed. R. Bankr. P. 3001(c)(3)(B) 32
Fed. R. Bankr. P. 3001
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Fed. R. Bankr. P. 3004 ..... 32, 35

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Statutes and rules—continued:

Fed. R. Bankr. P. 3007 32
Fed. R. Bankr. P. 3007(a) 32
Fed. R. Bankr. P. 9009 28
Fed. R. Bankr. P. 9011 ..... 21, 32
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Fed. R. Bankr. P. 9011(c) 6
Fed. R. Bankr. P. 9011(c)(2) 40
Ala. Code § 6-2-16 ..... 17, 19
Ala. Code § 6-2-34 7
Miss. Code Ann. § 15-1-3(1) 18
Wis. Stat. Ann. § 893.05 18

Miscellaneous:

Administrative Office of the United States Courts, *Bankruptcy Cases Filed by Pro Se Debtors, by Chapter, During the 12-Month Period Ending September 30, 2016*, tbl. F-28 30
Agenda Book for the Meeting of the Advisory Committee on Bankruptcy Rules (Mar. 26-27, 2009) <tinyurl.com/2009agenda> 20, 21
51 Am. Jur. 2d *Limitation of Actions* (West 2016) 17, 19
Black's Law Dictionary (10th ed. 2014) 31
Collier on Bankruptcy (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016) 24, 32, 35
Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report* (Mar. 2016) <tinyurl.com/cfpbannualreport> 37
54 C.J.S. *Limitations of Actions* (2010) 19, 25
Federal Trade Commission, *Consumer Information: Time-Barred Debts* (2013) <tinyurl.com/ftcinformation> 25

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Miscellaneous—continued:

Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010) <tinyurl.com/ftcdebtcollection> 25, 34
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 16, 23, 24, 45
H.R. Rep. No. 1202, 94th Cong., 2d Sess. (1976) 31, 37
Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393 (1985) 24
Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17 (2012) 36
Minutes for the Meeting of the Advisory Committee on Bankruptcy Rules (Mar. 26-27, 2009) <tinyurl.com/2009minutes> 21
William L. Norton Jr. & William L. Norton III, *Norton Bankruptcy Law and Practice* (3d ed. 2016) 23
Restatement (Second) of Conflict of Laws (1971) 25
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 40, 45
S. Rep. No. 382, 95th Cong., 1st Sess. (1977) 33, 36, 42
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 16
WebRecon LLC, *Do You Remember ... When September Was Still Unpredictable? Debt Collection Litigation & CFPB Complaint Stats, Sept. 2016* (last visited Nov. 11, 2016) <tinyurl.com/webreconsept2016> 38
WebRecon LLC, *Out Like a Lion ... Debt Collection Litigation & CFPB Complaint Statistics, Dec. 2015 & Year in Review* (last visited Nov. 11, 2016) <tinyurl.com/webreconyearinreview> 38

In the Supreme Court of the United States

No. 16-348

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 823 F.3d 1334. The order of the district court granting petitioner's motion to dismiss (Pet. App. 18a-37a) is reported at 528 B.R. 462.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2016. A petition for rehearing was denied on August 19, 2016 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on September 16, 2016, and granted on October 11, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Relevant provisions of the Bankruptcy Code, 11 U.S.C. 101-1532; the Fair Debt Collection Practices Act, 15 U.S.C. 1692-1692p; and the Federal Rules of Bankruptcy Procedure are reproduced in an appendix to this brief.

STATEMENT

This case presents two related questions concerning the interplay between the Bankruptcy Code (Code) and the Fair Debt Collection Practices Act (FDCPA). The Code entitles a creditor to file a proof of claim in a bankruptcy proceeding. Together with the accompanying rules, the Code requires a creditor seeking to collect on specified types of consumer debt to include certain information in the proof of claim, so as to enable parties in interest to assess the claim's timeliness, and it provides a remedial scheme to address abusive or otherwise improper filings. The earlier-enacted FDCPA prohibits debt collectors from engaging in collection practices that are deceptive, misleading, unfair, or unconscionable. The questions presented by this case are, first, whether a debt collector violates the FDCPA by filing an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding, and second, whether the Bankruptcy Code precludes such an application of the FDCPA.

Petitioner is a debt purchaser that acquired respondent's defaulted credit-card debt. When respondent filed for bankruptcy, petitioner filed a proof of claim in her bankruptcy case. The proof of claim accurately listed the amount of the debt and other required information, including the date of the last transaction on respondent's account. Because that date was more than six years before petitioner's filing, the debt appears to have been

time-barred under the relevant state law. Respondent objected to petitioner's claim, and the bankruptcy court disallowed it.

Three days later, respondent filed a separate lawsuit against petitioner outside the bankruptcy proceeding, alleging that the filing of a proof of claim on a time-barred debt in the bankruptcy proceeding violated the FDCPA. The district court granted petitioner's motion to dismiss. In a decision contrary to decisions from every other court of appeals to have considered the issue, the Eleventh Circuit reversed and remanded. The Eleventh Circuit recognized that the Code permits creditors to file proofs of claim for time-barred debts in bankruptcy proceedings. It nevertheless held, first, that debt collectors violate the FDCPA when they file such proofs of claim, and, second, that the Code does not preclude applying the FDCPA to prohibit such filings. Both of those holdings were incorrect, and the Eleventh Circuit's judgment should be reversed.

A. Background

1. "The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor." *Marrama* v. *Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007) (internal quotation marks and citation omitted). An individual debtor can commence a bankruptcy proceeding by filing a voluntary petition, typically under Chapter 7 or Chapter 13 of the Code. See 11 U.S.C. 301. At that point, the debtor's property becomes part of the bankruptcy estate. See 11 U.S.C. 541(a). In connection with the filing of the petition, the debtor is required to file a list of creditors and a schedule of assets and liabilities. See 11 U.S.C. 521(a)(1)(A), (B)(i).

The Code establishes the procedures by which debtors "can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991) (internal quotation marks and citation omitted). Specifically, the Code provides that, "[w]hen a debtor declares bankruptcy, each of [the debtor's] creditors is entitled to file a proof of claim" against the estate. *Travelers Casualty & Surety Co.* v. *Pacific Gas & Electric Co.*, 549 U.S. 443, 449 (2007); see 11 U.S.C. 501. Consistent with bankruptcy's goal of resolving all potential claims against the debtor, the Code defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. 101(5)(A). As this Court has repeatedly recognized, that language gives the term "claim" the "broadest available definition." *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991); see *FCC* v. *NextWave Personal Communications Inc.*, 537 U.S. 293, 302 (2003).

"Once a proof of claim has been filed, the court must determine whether the claim is 'allowed' under [Section] 502(a) of the Bankruptcy Code." *Travelers*, 549 U.S. at 449. In consumer bankruptcies, the Code provides for the appointment of a trustee, who is required to examine proofs of claim and, where appropriate, object to any improper claim. See 11 U.S.C. 704(a)(5), 1302(b)(1). By default, a claim is deemed allowed unless the trustee or some other party in interest (such as the debtor or another creditor) objects. See 11 U.S.C. 502(a). If there is an objection, the bankruptcy court must determine whether the claim should be disallowed under any of the "exceptions"

listed in the Code. See 11 U.S.C. 502(b); *Travelers*, 549 U.S. at 449.

As is relevant here, a claim may be disallowed because it is "unenforceable * * * under any * * * applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. 502(b)(1). The Code specifically provides that the estate is entitled to invoke any "defense" that would have been available to the debtor, "including statutes of limitation." 11 U.S.C. 558. For claims based on certain types of consumer credit agreements (such as credit-card agreements), the Federal Rules of Bankruptcy Procedure require the creditor to disclose certain information in the proof of claim, including the date of the account holder's last transaction; the date of the last payment on the account; and the date the account was charged to profit and loss. See Fed. R. Bankr. P. 3001(c)(3)(A)(iii)-(v). The purpose of requiring those additional disclosures is to aid parties in interest in "assessing the timeliness of the claim." Fed. R. Bankr. P. 3001 advisory committee's notes (2012).

Beyond the procedures for the filing and allowance of claims, which ensure the comprehensiveness of the bankruptcy process and the equitable distribution of assets, the Code provides several additional protections for debtors. Once a debtor declares bankruptcy, the Code's automatic-stay provision operates to enjoin any act to "collect, assess, or recover a [preexisting] claim against the debtor," such as phone calls and letters to the debtor seeking to obtain a payment on the debt. 11 U.S.C. 362(a)(6). At the conclusion of the bankruptcy process, moreover, the Code discharges all debts that have been brought into the bankruptcy process. See 11 U.S.C. 523(a)(3), 727(b). Discharge provides the fresh start promised by bankruptcy and protects the debtor from any future acts to recover discharged debts, as well as from various forms of

discrimination based on the nonpayment of those debts. See 11 U.S.C. 524(a), 525.

The Bankruptcy Code has a comprehensive remedial scheme for abusive or otherwise improper actions taken in bankruptcy proceedings. The Code permits a bankruptcy court to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a). In addition, the Federal Rules of Bankruptcy Procedure state that the presentation of any document to the court constitutes a certification that the document is not presented "for any improper purpose" and that any "legal contentions * * * are warranted by existing law" (or by an argument for modifying the law). Fed. R. Bankr. P. 9011(b). Violations of that provision are punishable by sanctions specified in the Rules. See Fed. R. Bankr. P. 9011(c).

2. This case results from a recent effort by the plaintiffs' bar to apply the Fair Debt Collection Practices Act to prevent the filing of certain types of claims in bankruptcy proceedings. The FDCPA was enacted in 1977, a year before the Code, as an amendment to the Consumer Credit Protection Act. See Pub. L. No. 95-109, 91 Stat. 874 (1977). In enacting the FDCPA, Congress sought, among other things, to "eliminate abusive debt collection practices," which it found "contribute to the number of personal bankruptcies." 15 U.S.C. 1692(a), (e). To achieve that end, the FDCPA bars debt collectors—defined broadly to include entities that "regularly collect[] or attempt[] to collect, directly or indirectly," debts owed to others, 15 U.S.C. 1692a(6)—from engaging in specified types of conduct.

Of particular relevance here, the FDCPA prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the

collection of any debt," including "false[ly] represent[ing] * * * the character, amount, or legal status of any debt." 15 U.S.C. 1692e. The FDCPA also prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect any debt," including "collect[ing] * * * any amount" that is not "expressly * * * permitted by law." 15 U.S.C. 1692f. The FDCPA provides a private right of action for consumers against debt collectors. See 15 U.S.C. 1692k. Successful plaintiffs are entitled to actual damages and costs, including attorney's fees. See 15 U.S.C. 1692k(a). Regardless of the existence of actual damages, the FDCPA provides for statutory damages of up to $1,000 in an individual action or up to $500,000 in a class action. See 15 U.S.C. 1692k(a)(2).

B. Facts And Procedural History

1. In 2014, respondent filed a petition for bankruptcy in the United States Bankruptcy Court for the Southern District of Alabama under Chapter 13 of the Bankruptcy Code. Respondent was represented by counsel throughout the bankruptcy proceeding, and the bankruptcy court duly assigned a trustee to respondent's case. J.A. 9-10.

Petitioner had previously purchased a defaulted credit-card debt incurred by respondent in the amount of $1,879.71. Respondent did not list that debt in the schedule accompanying her bankruptcy petition. Petitioner subsequently filed a proof of claim for that debt in the bankruptcy proceeding. J.A. 12-19. As required by Bankruptcy Rule 3001, petitioner's proof of claim accurately listed the date of the last transaction on respondent's account as May 2003. J.A. 18. Respondent is an Alabama resident, and Alabama has a six-year limitations period for claims of the type at issue here. See Ala. Code § 6-2-34. The proof of claim was filed more than six years after

the last transaction on respondent's account. J.A. 15. Respondent's counsel objected to petitioner's claim on the ground that it lacked supporting documentation, J.A. 21, and the bankruptcy court disallowed it.[1]

Respondent's eligible assets were smaller than her debts. See Bankr. Ct. Dkt. 1, at 1 (Mar. 24, 2014). The bankruptcy court accordingly confirmed a non-100% repayment plan. See Bankr. Ct. Dkt. 42, at 1 (Sept. 15, 2014). Under such a plan—as in the majority of Chapter 13 cases and virtually all Chapter 7 cases—the amount the debtor pays depends on the debtor's projected income, not the total amount of the creditors' claims. See *In re Dubois*, 834 F.3d 522, 531-532 (4th Cir. 2016). Respondent's bankruptcy plan specified that she would pay $402 per month for 60 months, amounting to approximately 77% of her outstanding unsecured debts. See Bankr. Ct. Dkt. 42, at 1.

2. Three days after the bankruptcy court disallowed petitioner's claim, respondent brought a putative nationwide class action against petitioner in the United States District Court for the Southern District of Alabama under the FDCPA. J.A. 23-28. Respondent chose to file her FDCPA claim as a stand-alone action, rather than as an adversary proceeding within the bankruptcy case. The complaint in this case appears to have been a form complaint; respondent's counsel misspelled her first name as

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[1] Because respondent's counsel objected to the claim on the ground that it lacked supporting documentation (rather than on the ground that it was untimely), and because this case is before the Court on a motion to dismiss, the record does not reflect whether there was some reason the limitations defense would not apply: for example, because the defense had been waived, the limitations period tolled, or the claim revived by the debtor's subsequent conduct. For present purposes, the Court may assume that the claim would have been disallowed if respondent had raised a timeliness defense.

"Aledia" and erroneously referred to her as "him[]." J.A. 23, 26. The complaint alleged that, because petitioner's claim was for a time-barred debt, the filing of the proof of claim in respondent's bankruptcy proceeding constituted a deceptive, misleading, unfair, and unconscionable debt-collection practice under the FDCPA. J.A. 25. The complaint sought actual damages (although it did not allege any), as well as statutory damages, attorney's fees, and costs. *Ibid.* Despite the fact that respondent was still in bankruptcy, she did not seek to proceed *in forma pauperis*; instead, she (or someone on her behalf) paid the filing fee of $400. J.A. 5.

3. Petitioner moved to dismiss the suit, and the district court granted the motion. Pet. App. 18a-37a. The district court recognized that it was bound by the Eleventh Circuit's decision in *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (2014), cert. denied, 135 S. Ct. 1844 (2015), which held that the filing of a proof of claim for a time-barred debt violates the FDCPA. Pet. App. 19a-20a. But the district court observed that the Eleventh Circuit had left open the related question whether the Code precludes such an application of the FDCPA. *Id.* at 20a.

The district court held that it does. Pet. App. 20a-37a. The court noted that, under Alabama law, the running of the limitations period does not extinguish a creditor's right to payment, but instead potentially eliminates the creditor's judicial remedy: namely, a civil judgment against the debtor. *Id.* at 22a. Analyzing the text of the Code, this Court's precedents, and bankruptcy practice, the district court determined that the Code permits a creditor to file a proof of claim for an unextinguished time-barred debt: that is, a debt on which the limitations period has run, but where the underlying right to payment continues to exist under state law. *Id.* at 21a-30a. The court then determined that there was an irreconcilable conflict

between the Code and the FDCPA, because "comply[ing] with the [FDCPA]" requires "surrendering [the creditor's] right under the Code." *Id.* at 33a. Accordingly, the court concluded that the earlier-enacted FDCPA "must give way" to the Code. *Id.* at 37a.

4. The court of appeals reversed and remanded. Pet. App. 1a-15a.[2]

The court of appeals first explained that it had decided a "nearly identical" question in *Crawford* and had held that "a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred." Pet. App. 2a, 5a. The court reaffirmed *Crawford*'s holding on that question. *Id.* at 5a-6a.

The court of appeals then turned to the related question it had expressly left open in *Crawford*: namely, whether the Bankruptcy Code "preclude[s] an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred." Pet. App. 7a. At the outset, the court of appeals agreed with the district court that, under the Code, a creditor has a "'right' to file a time-barred claim." *Id.* at 8a. The court explained that "the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations." *Id.* at 7a.

The court of appeals nevertheless concluded that the Code "does not preclude an FDCPA claim in the bankruptcy context." Pet. App. 15a. The Code and the FDCPA could be "reconciled," according to the court, be-

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[2] The court of appeals considered this case together with another case in which the same district court had subsequently relied on the reasoning of its decision in this case. See Pet. App. 4a. While the court of appeals addressed both cases in a single opinion, it entered separate judgments in each case. Only petitioner's case is before the Court.

cause the FDCPA "dictates the behavior of only 'debt collectors'" and because the Code "establishes the ability to file a proof of claim" while the FDCPA "addresses the later ramifications of filing a claim." *Id.* at 12a. The court reasoned that there was no "positive repugnancy" between the statutes, because a debt collector that files a proof of claim for a time-barred debt (as authorized under the Code) "is simply opening [itself] up to a potential lawsuit for an FDCPA violation." *Id.* at 14a (internal quotation marks omitted). In the court of appeals' view, subjecting conduct authorized by the Bankruptcy Code to civil liability under the FDCPA did not give rise to an irreconcilable conflict between the two statutes. *Id.* at 15a.

5. The court of appeals subsequently denied rehearing. Pet. App. 16a-17a.

SUMMARY OF ARGUMENT

A proof of claim is a creature of the Bankruptcy Code—a filing in a bankruptcy case defined and regulated by the Code and the accompanying rules. Of particular relevance here, the Code entitles a creditor that holds an unextinguished time-barred debt to file a proof of claim in the bankruptcy proceeding. The court of appeals erred by holding that the filing of such a proof of claim violates the FDCPA, and it further erred by holding that the Code does not preclude an application of the FDCPA that would prohibit such a filing.

I. As every court of appeals (including the Eleventh Circuit in the decision below) has correctly concluded, the Bankruptcy Code entitles a creditor such as petitioner to file a proof of claim for an unextinguished time-barred debt.

Under the Code, any creditor, including a debt collector, may file a proof of claim in the bankruptcy court when a debtor declares bankruptcy. In order to have a "claim"

for purposes of the Code, a creditor must have a "right to payment" under the relevant state law. Here, Alabama law (like the law of almost every other State) provides that the holder of a time-barred debt retains a right to payment. Accordingly, petitioner had a valid "claim" under the Code and was entitled to file a proof of claim for its debt.

Indeed, the Code expressly addresses the question of how a bankruptcy court should process a proof of claim for a time-barred debt. The Code seeks to bring all claims, whether enforceable or not, into the bankruptcy process in order to provide comprehensive resolution for the debtor. The Code also establishes a specific procedure for determining the allowability of claims, under which the trustee, assisted by other parties in interest, can raise objections on limitations or other grounds. Where those objections are sustained, the claim will be disallowed, with the result that it will not be paid by the estate and will ultimately be discharged.

What is more, the Federal Rules of Bankruptcy Procedure also address the filing of proofs of claim for time-barred debts. For claims involving certain types of consumer debt (including the type at issue here), Bankruptcy Rule 3001 requires a creditor to make disclosures that make it easy for the trustee and other parties in interest to raise timeliness objections. At the same time, the Bankruptcy Rules deliberately stop short of imposing an affirmative burden on creditors to identify limitations defenses in their proofs of claim.

This Court's cases, too, support the conclusion that the Code authorizes the filing of proofs of claim for time-barred debts. Those cases emphasize both the breadth of the Code's definition of "claim" and the breadth of States' authority to define creditors' underlying property rights,

even where a debt may not be recoverable via a monetary judgment in an action outside bankruptcy.

The inclusion of claims for time-barred debts within the Code's broad definition of "claim" is wholly consistent with the policies animating bankruptcy: most notably, the Code's core purpose of comprehensively bringing all of a debtor's debts into a single bankruptcy proceeding and resolving them. Excluding claims for time-barred debts would undermine the Code's operation by gutting its automatic-stay and discharge provisions—provisions that confer integral protections on debtors both during and after bankruptcy.

II. Filing a proof of claim for a time-barred debt, as authorized by the Code, does not violate the FDCPA.

The FDCPA prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. A creditor does not violate Section 1692e by filing an accurate proof of claim for an unextinguished time-barred debt. Petitioner's proof of claim was entirely accurate, both in its factual content and in its implied representation that the debt collector had a "claim" under the Code. Under this Court's recent decision in *Sheriff* v. *Gillie*, 136 S. Ct. 1594 (2016), the filing of such a proof of claim did not violate Section 1692e.

Nor did such a filing violate the provision of the FDCPA that prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. The bankruptcy process is replete with protections for a debtor, including the appointment of a trustee who is obligated to monitor proofs of claim and raise all necessary objections. The vast majority of debtors (like respondent here) have their own counsel as an additional layer of review. The creditor directs a proof of claim not at the debtor, but rather at the

bankruptcy estate, against whose assets the claim is being made. And an additional proof of claim, even if allowed, usually has no impact on a debtor's ultimate payments under the bankruptcy plan. There is therefore nothing unjust or unfair about the filing of a proof of claim for a time-barred debt.

Precisely because the allowance of a claim for a time-barred debt will ordinarily have no impact on the debtor, policing the filings of such proofs of claim in bankruptcy proceedings would assist only other creditors, not the consumers the FDCPA is designed to protect. And in practice, it would fuel already rampant litigation driven by the plaintiffs' bar for its own benefit. It would make little sense to stretch the language of the FDCPA to encompass the conduct at issue here.

III. Even if the FDCPA could be read to prohibit the filing of a proof of claim for a time-barred debt, the Bankruptcy Code would preclude that application of the FDCPA.

As an initial matter, this Court should interpret the FDCPA in such a way as to harmonize it with the Code. Assuming, *arguendo*, that the FDCPA is ambiguous on the question whether filing a proof of claim for a time-barred debt is prohibited, any ambiguity should be resolved against such an interpretation, because the Code expressly authorizes that very practice.

This Court's decision in *Kokoszka* v. *Belford*, 417 U.S. 642 (1974), is instructive. There, the Court held that a closely related consumer-protection statute could not be read to apply within bankruptcy. That holding counsels strongly in favor of a similar approach in interpreting the FDCPA. A contrary approach would disregard the Code's comprehensive scheme, its emphasis on uniformity, and its carefully tailored remedies for abusive or otherwise improper conduct in bankruptcy proceedings.

Finally, if the FDCPA were interpreted to prohibit the filing of a proof of claim for a time-barred debt, it would create an irreconcilable conflict with the Code. So read, the earlier-enacted FDCPA would prohibit what the later-enacted Code entitles a creditor to do. That conflict would suffice to repeal even clear statutory text, so it is plainly sufficient to preclude the judicial interpretation of the FDCPA that the Eleventh Circuit adopted here. It would be inconsistent with Congress's objective in expanding the definition of "claim" to construe an earlier-enacted, non-bankruptcy statute to limit the proofs of claim that can be filed in a bankruptcy proceeding.

In short, there is no valid justification for interpreting the FDCPA to prevent the filing of a proof of claim for a time-barred debt. The court of appeals' outlying interpretation is erroneous, and its judgment should therefore be reversed.

ARGUMENT

I. THE BANKRUPTCY CODE CREATES A RIGHT TO FILE A PROOF OF CLAIM FOR AN UNEXTINGUISHED TIME-BARRED DEBT IN A BANKRUPTCY PROCEEDING

As a threshold matter, the Bankruptcy Code plainly entitles a debt collector to file a proof of claim for an unextinguished time-barred debt. The Code gives every creditor, including a debt collector, the right to file a proof of claim when the debtor files for bankruptcy. A claim for an unextinguished time-barred debt qualifies as a "claim" under the Code, because the creditor has a right to payment under applicable state law. As a result, the Code confers a right to file a proof of claim for such a time-barred debt. That conclusion is so inescapable that every court of appeals to have considered the question, including the Eleventh Circuit in the decision below, has agreed

that the Code creates such a right. See *Dubois*, 834 F.3d at 529-530; *Owens* v. *LVNV Funding, LLC*, 832 F.3d 726, 730-734 (7th Cir. 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016); Pet. App. 8a-9a.

A. The Bankruptcy Code Defines A 'Claim' As A 'Right To Payment,' Which Includes The Right To Payment On An Unextinguished Time-Barred Debt

Under the Code, a creditor, including a debt collector, is entitled to file a proof of claim with the bankruptcy court when the debtor declares bankruptcy. 11 U.S.C. 501(a); see *Travelers*, 549 U.S. at 449. A "creditor" is defined simply as an "entity that has a claim against the debtor." 11 U.S.C. 101(10)(A). And a "proof of claim" is nothing more than a "written statement setting forth a creditor's claim." Fed. R. Bankr. P. 3001(a).

The Code defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. 101(5)(A). By including that language in the Code, Congress "intended * * * to adopt the broadest available definition of 'claim.'" *Johnson*, 501 U.S. at 83. Congress sought to ensure that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case," with the result that the debtor can obtain the "broadest possible relief." H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977); see *Pennsylvania Department of Public Welfare* v. *Davenport*, 495 U.S. 552, 558 (1990); S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978).

It is a "settled principle" that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obliga-

tion." *Travelers*, 549 U.S. at 450 (quoting *Raleigh* v. *Illinois Department of Revenue*, 530 U.S. 15, 20 (2000)). Consistent with that principle, this Court has repeatedly recognized that, for purposes of the Code's definition of "claim," a "right to payment" exists where such a right is "recognized under state law." *Id.* at 451; see *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979).

Under Alabama law, the relevant state law here, the running of a statutory limitations period does not "extinguish[]" the underlying "right" to payment; rather, it potentially eliminates a creditor's judicial remedy. *Ex parte Liberty National Life Insurance*, 825 So. 2d 758, 765 (Ala. 2002) (per curiam) (internal quotation marks and citation omitted). Indeed, because the running of the limitations period is an affirmative defense, Alabama courts will enter judgment for the creditor even on a time-barred claim where the debtor fails to raise the limitations defense at an appropriate time and thereby forfeits the defense. See, *e.g.*, *Ex parte Alabama ex rel. Ohio*, 718 So. 2d 669, 671 (Ala. 1998); *Oliver* v. *Dudley*, 109 So. 2d 668, 669 (Ala. 1959). Alabama law also allows a time-barred claim to be revived in certain circumstances: for example, where a debtor makes a partial payment on the debt or supplies a written promise to pay. See Ala. Code § 6-2-16; *Defco, Inc.* v. *Decatur Cylinder, Inc.*, 595 So. 2d 1329, 1333 (Ala. 1992). For present purposes, the critical point is that, regardless of the running of the limitations period, a creditor such as petitioner retains a right to payment on a time-barred debt under Alabama law.

Nor is Alabama law atypical in that respect. As this Court has recognized, it is the "traditional rule" that "expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right." *Semtek International Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001); see, *e.g.*, 51 Am. Jur. 2d

Limitation of Actions § 20 (West 2016). Almost all of the States adhere to that rule.[3] Because petitioner has a right to payment under applicable state law, it necessarily follows under the Code's definition of "claim" that petitioner was entitled to file a proof of claim in respondent's bankruptcy proceeding.

B. The Bankruptcy Code Invites The Filing Of Proofs Of Claim For Unextinguished Time-Barred Debts

Beyond its definition of "claim," the Code generally invites the filing of proofs of claim for rights that are not enforceable, and specifically contemplates the filing of proofs of claim for unextinguished time-barred debts.

1. The Code expressly brings claims that are not presently enforceable into the bankruptcy proceeding. As examples of "claims," the Code cites rights to payment that are "contingent," "unmatured," or "disputed." 11 U.S.C. 101(5)(A). Neither contingent nor unmatured claims are presently enforceable. See *In re Rosteck*, 899 F.2d 694, 697 (7th Cir. 1990) (describing a "contingent" claim as one that "depend[s] on future uncertain events"); *In re Camp*, 78 B.R. 58, 63 n.6 (Bankr. E.D. Pa. 1987) (describing an "unmatured" claim as one where "the right to payment exists at the outset, but the time of payment is deferred" (citation omitted)). And the same is true for at least some disputed claims: namely, those where a debtor's reasons for disputing the claim turn out to be valid.

The Code also establishes a specific process for determining the allowability of claims: that is, for resolving de-

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[3] We are aware of only two States, Mississippi and Wisconsin, where the expiration of the limitations period extinguishes not just the remedy but also the underlying right to payment. See Miss. Code Ann. § 15-1-3(1); Wis. Stat. Ann. § 893.05.

fenses to claims, including limitations defenses. In consumer bankruptcies, the Code provides for the appointment of a trustee, who is required to examine proofs of claim and object, as needed, to any claim that is improper. See 11 U.S.C. 704(a)(5), 1302(b)(1). By default, most claims are deemed allowed unless the trustee or some other party in interest objects. See 11 U.S.C. 502(a), (d), (e).

Upon an objection, the bankruptcy court must determine whether the claim should be disallowed under any of the exceptions listed in the Code: for example, if a defense renders the claim "unenforceable against the debtor and property of the debtor." 11 U.S.C. 502(b)(1). The Code specifically provides that "[t]he [bankruptcy] estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, *including statutes of limitation*." 11 U.S.C. 558 (emphasis added). The Code thus invites claims for time-barred debts to be brought into the bankruptcy process; where the trustee or another party in interest raises a valid objection on limitations grounds, the claim will be disallowed, with the result that it will not be paid by the estate and will ultimately be discharged.

Notably, a limitations objection will not always be successful. Statutes of limitations generally provide affirmative defenses that are subject to forfeiture, tolling, and revival, all of which would make a seemingly time-barred debt enforceable. See, *e.g.*, 54 C.J.S. *Limitations of Actions* § 133, at 150 (2010); 51 Am. Jur. 2d *Limitation of Actions* § 16; *Shepherd* v. *Thompson*, 122 U.S. 231, 235 (1887); Ala. Code § 6-2-16. For present purposes, the key point is that the Code establishes that a limitations defense (like any other defense) will be raised, and if necessary litigated, *in response to* the filing of a proof of claim

for a potentially time-barred debt. See 11 U.S.C. 502(a), (b)(1), 558.

2. The Federal Rules of Bankruptcy Procedure also address the filing of proofs of claim for time-barred debts. For claims involving certain types of consumer debt (including the type at issue here), Bankruptcy Rule 3001 requires a creditor to include certain information in the proof of claim, including the date of the account holder's last transaction; the date of the last payment on the account; and the date the account was charged to profit and loss. See Fed. R. Bankr. P. 3001(c)(3)(A). Those additional disclosures were mandated precisely for the purpose of enabling parties in interest to "assess[] the timeliness of the claim." Fed. R. Bankr. P. 3001 advisory committee's notes (2012); see *Agenda Book for the Meeting of the Advisory Committee on Bankruptcy Rules* 86-87, 90 (Mar. 26-27, 2009) (*Agenda Book*) <tinyurl.com/2009-agenda>. And the failure to supply the required information exposes a creditor to sanctions, including the payment of attorney's fees and other expenses "caused by the failure." Fed. R. Bankr. P. 3001(c)(2)(D). Consistent with the Code, therefore, the Bankruptcy Rules authorize the filing of proofs of claim for time-barred debts, but provide protections to ensure that objections to such claims can be made with minimal burden.

Critically, when it proposed adding the disclosure requirements to Bankruptcy Rule 3001, a working group of the Advisory Committee on Rules of Bankruptcy Procedure considered going further and requiring creditors affirmatively to "state whether the claim is timely under the relevant statute of limitations." *Agenda Book* 86. But it stopped short of such a requirement, instead recommending that creditors supply the factual information that would allow parties in interest to raise timeliness objec-

tions "more easily." *Id.* at 86-87. The Advisory Committee adopted that reasoning and rejected the affirmative certification requirement. See *Minutes for the Meeting of the Advisory Committee on Bankruptcy Rules* 9 (Mar. 26-27, 2009) <tinyurl.com/2009minutes>. By devising specific procedures for the filing of proofs of claim for time-barred debts, the Advisory Committee obviously contemplated that such proofs of claim would be filed.[4]

3. This Court's cases on the scope of bankruptcy proceedings support the conclusion that the Code authorizes the filing of proofs of claim for time-barred debts. Those cases emphasize both the breadth of the Code's definition of "claim" and the breadth of States' authority to define creditors' underlying property rights. See, *e.g.*, *Travelers*, 549 U.S. at 449-451; *Grogan*, 498 U.S. at 283; *Davenport*, 495 U.S. at 558-559; *Butner*, 440 U.S. at 54-55; *Bryant* v. *Swofford Brothers Dry Goods*, 214 U.S. 279, 290-291 (1909).

This Court's decision in *Davenport* is illustrative. There, the Court considered whether a right to restitution payments from criminal offenders who declared bankruptcy constituted a "claim" for purposes of the Code. Although the probation department could revoke the debtors' probation if they missed their payments, neither the probation department nor the victim had a civil cause of action to recover the unpaid sums (and there was thus no way to obtain a monetary judgment for those sums). See 495 U.S. at 558-559. The Court nevertheless held that

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[4] Because the Bankruptcy Code expressly authorizes the filing of proofs of claim for time-barred debts, it necessarily follows that such a filing is not sanctionable under Bankruptcy Rule 9011 simply because a limitations defense is available. The Advisory Committee's decision to require only factual disclosures, rather than a certification about the claim's timeliness, underscores the point. See *Agenda Book* 86.

the probation department and the victim had a "right to payment," and thus a "claim," under the Code. See *id.* at 558-560. In so holding, the Court emphasized "Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim.'" *Id.* at 558. *Davenport* thus stands for the proposition that a "claim" can exist under the Code regardless of the creditor's ability to obtain a monetary judgment in an action outside bankruptcy.

To be sure, in *Davenport*, the Court also stated that a "claim" is "nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." 495 U.S. at 559. But precisely because the obligation at issue in *Davenport* was enforceable, albeit through a means other than a monetary judgment, the Court was not purporting to create a rule excluding "unenforceable" obligations from the scope of the term "claim." Instead, the Court was merely clarifying that "[neither] the purpose [n]or enforcement mechanism" of an obligation could *limit* its status as a "claim." *Id.* at 560.[5] And excluding "unenforceable" obligations from the definition of "claim" would conflict with the plain language of the Code, which expressly sweeps in claims that are not presently enforceable (such as "contingent" and "unmatured" claims) and instructs how those claims should be processed. See pp. 18-19, *supra*.

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[5] To the extent this Court has quoted the foregoing language from *Davenport* in subsequent cases, it has done so to emphasize the *breadth* of the term "claim," not to narrow it. See *NextWave*, 537 U.S. at 302-303; *Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998); *Johnson*, 501 U.S. at 83-84.

C. Including Claims For Time-Barred Debts Within The Code's Broad Definition Of 'Claim' Serves The Code's Key Policies

The inclusion of claims for time-barred debts within the Code's broad definition of "claim" is wholly consistent with the policies animating bankruptcy. After all, "[a] fundamental principle of the bankruptcy process is the collective treatment of all of a debtor's creditors at one time." 1 William L. Norton Jr. & William L. Norton III, *Norton Bankruptcy Law and Practice* § 3:9, at 3-17 (3d ed. 2016); see, *e.g.*, *In re Glenn*, 542 B.R. 833, 841 (Bankr. N.D. Ill. 2016) (observing that, "[t]he more participation there is[,] the better [the bankruptcy] process works"). A contrary interpretation would erode the protections and benefits that bankruptcy provides to debtors.

1. Excluding claims for time-barred debts from the definition of "claim" would eliminate one of the Code's core protections for debtors: the automatic-stay provision that prevents creditors from taking any act to "collect, assess, or recover a [preexisting] claim against the debtor." 11 U.S.C. 362(a)(6). In adopting that provision, Congress sought to protect "[i]nexperienced, frightened, or ill-counseled debtors" from conduct that could lead them to "succumb to suggestions to repay [a preexisting debt] notwithstanding their bankruptcy." H.R. Rep. No. 595, *supra*, at 342.

If claims for time-barred debts do not qualify as "claims" under the Code, the foregoing provision, which by its terms governs only efforts to collect "claim[s] against the debtor," would not apply to those debts. A creditor could thus continue to contact a debtor during the bankruptcy in an effort to get the debtor to repay all or some of the debt (or to take some other action that would revive the claim). Such a regime would strip the debtor of

the repose a declaration of bankruptcy is supposed to provide, and it could conceivably result in payment to a holder of time-barred debt at the expense of the estate (thus contravening the Code's goal of preserving the estate for equitable division among all of the creditors). See 3 *Collier on Bankruptcy* ¶ 362.03, at 362-23 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016) (*Collier on Bankruptcy*).

2. Excluding claims for time-barred debts from the definition of "claim" would also limit the benefits to the debtor from discharge—widely understood to be the "principal advantage" of bankruptcy in the first place. Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393, 1393 (1985). A discharge in bankruptcy applies only to a debtor's "debts." See 11 U.S.C. 727(b), 1328(a). A "debt," in turn, is "liability on a claim" as defined by the Code. 11 U.S.C. 101(12). It necessarily follows that, if claims for time-barred debts do not constitute "claims" for purposes of the Code, those debts cannot be discharged.

In light of the Bankruptcy Code's ultimate goal of granting debtors a "fresh start," *Marrama*, 549 U.S. at 367 (internal quotation marks and citation omitted), it is fundamental to the Code's operation that all of a debtor's debts are brought into the bankruptcy proceeding in order to ensure that they are discharged. It was for that reason that Congress gave the term "claim" such an expansive definition in the Code. See *Davenport*, 495 U.S. at 558; H.R. Rep. No. 595, *supra*, at 309. There is no valid justification to construe the term "claim" so as to exclude claims for time-barred debts.

The inability to discharge time-barred debts would harm debtors in multiple ways. First, a discharge acts as a continuing injunction against any "act[] to collect" the debt. 11 U.S.C. 524(a)(2). Absent a discharge, a creditor

could continue contacting the debtor through phone calls and letters in an effort to collect. See, *e.g.*, *Owens*, 832 F.3d at 732 & n.6; Federal Trade Commission, *Consumer Information: Time-Barred Debts* (July 2013) (*Consumer Information*) <tinyurl.com/ftcinformation>; Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 22-23 (July 2010) (*Repairing a Broken System*) <tinyurl.com/ftcdebtcollection>. Second, a discharge extinguishes the debt nationwide, whereas statutes of limitations vary from State to State. See 54 C.J.S. *Limitations of Actions* § 20, at 38. Unless a time-barred debt is discharged, a creditor could potentially collect on the debt by filing a lawsuit in a State with a longer limitations period and no "borrowing" statute. See 1 Restatement (Second) of Conflict of Laws §§ 142(2) & cmt. f, 143 & cmt. a, at 396-397, 400 (1971). Third, a discharge ensures that the debtor receives the full benefits of a fresh start, including protection from various forms of discrimination based on the nonpayment of the debt. See 11 U.S.C. 525.

In sum, the Bankruptcy Code sweeps claims for time-barred debts within its broad definition of "claim," and the Code, together with the accompanying rules, establishes a process for resolving these claims easily and expeditiously. Because petitioner has a right to payment under applicable state law, it possessed a "claim" and thus was entitled to file a proof of claim in respondent's bankruptcy proceeding.

II. THE FDCPA DOES NOT PROHIBIT FILING A PROOF OF CLAIM FOR AN UNEXTINGUISHED TIME-BARRED DEBT IN A BANKRUPTCY PROCEEDING

Petitioner did not violate the FDCPA by filing a proof of claim on an unextinguished time-barred debt, as authorized by the Bankruptcy Code. The FDCPA prohibits

debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, or from using "unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. 1692f. Filing a proof of claim on an unextinguished time-barred debt pursuant to the Code does not violate either of those prohibitions. Petitioner's proof of claim accurately presented all of the facts required by the Bankruptcy Rules to enable parties in interest to assess the claim's timeliness. Nor is there anything unfair or unconscionable about filing an accurate proof of claim in the bankruptcy process, which is replete with protections for the debtor. And it would be far removed from the core purposes of the FDCPA to extend that statute to regulate the filing of proofs of claim in bankruptcy proceedings.

For those reasons, every court of appeals to consider this question, with the exception of the Eleventh Circuit, has concluded that the FDCPA does not prohibit filing a proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding. Compare *Dubois*, 834 F.3d at 533; *Owens*, 832 F.3d at 736-737; *Nelson* v. *Midland Credit Management, Inc.*, 828 F.3d 749, 752 (8th Cir. 2016), with Pet. App. 5a-6a. This Court should now reach the same conclusion.

A. Filing A Factually Accurate Proof Of Claim For An Unextinguished Time-Barred Debt In A Bankruptcy Proceeding Does Not Violate Section 1692e

To begin with, petitioner did not violate Section 1692e by filing a proof of claim on an unextinguished time-barred debt. That provision prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. It proceeds to list sixteen non-

exclusive categories of conduct qualifying as false or misleading, including "false[ly] represent[ing] * * * the character, amount, or legal status of any debt." *Ibid.*

1. This Court interpreted Section 1692e just a few months ago in *Sheriff* v. *Gillie*, 136 S. Ct. 1594 (2016). In that case, a state attorney general appointed private attorneys to collect a debt on his behalf; those attorneys used the attorney general's letterhead on letters seeking to collect those debts. See *id.* at 1598-1599. The letters disclosed that the attorneys were debt collectors and included the attorneys' contact information in the signature block. See *id.* at 1599. The debtors sued the attorneys, contending that their use of the attorney general's letterhead violated Section 1692e. See *id.* at 1598.

The Court unanimously rejected the debtors' claim, holding that the use of the letterhead was accurate and thus not "false" or "misleading" for purposes of Section 1692e. See 136 S. Ct. at 1601. The Court reasoned that the letterhead correctly identified the principal for whom the attorneys were acting as agents. See *ibid.* Neither debtors' fear that the attorney general might take punitive action against them, nor debtors' doubts about the authenticity of the letters, altered the Court's analysis. See *id.* at 1602-1603. As the Court explained, "[Section] 1692e bars debt collectors from deceiving or misleading consumers; it does not protect consumers from fearing the actual consequences of their debts." *Id.* at 1603.

Like the letters in *Sheriff*, petitioner's proof of claim here was entirely accurate and in no way misleading. The proof of claim contained all the information required by Bankruptcy Rule 3001, including the date of the account holder's last transaction, the date of the last payment on the account, and the date the account was charged to profit and loss. J.A. 18. It is undisputed that petitioner

made the required disclosures and that it did so correctly and completely.

Petitioner's proof of claim was equally accurate with regard to the "legal status" of the debt. 15 U.S.C. 1692e(2)(A). As required by the Bankruptcy Rules, petitioner used a standard form for its filing. See Fed. R. Bankr. P. 3001(a), 9009. Petitioner made no affirmative representation concerning the legal status of the debt other than the preprinted notation "PROOF OF CLAIM" at the top of the form. J.A. 12. That notation indicated petitioner's good-faith belief that it had a claim—that is, a right to payment—regardless of whether the right was ultimately enforceable. See 11 U.S.C. 101(5)(A). Because petitioner did in fact have a right to payment under Alabama law and thus under the Code, see pp. 16-17, *supra*, petitioner's belief was well founded.

Petitioner was under no obligation affirmatively to state that the claim was timely (or to make any representations concerning other possible defenses). Indeed, the Advisory Committee deliberately chose not to require creditors to make such a statement. See pp. 20-21, *supra*. Consistent with the requirements the Advisory Committee actually adopted in the Bankruptcy Rules, the proof-of-claim form did not ask petitioner to express its view as to whether the claim was subject to a limitations defense, but instead merely required petitioner to make certain factual disclosures so as to enable parties in interest to assess the claim's timeliness. Because petitioner accurately made those disclosures, the proof of claim was not "false" or "misleading," and it therefore did not violate Section 1692e.

2. As in *Sheriff*, because petitioner's proof of claim was accurate by any standard, this Court need not consider the question of whose perspective is relevant in adjudging a potentially false or misleading statement. See

Sheriff, 136 S. Ct. at 1602 n.6 (reserving the question). In this context, however, the applicable standard confirms the conclusion that petitioner did not violate Section 1692e by filing its proof of claim.

Generally, whether a communication is false or misleading is measured by reference to its intended recipient. See, *e.g.*, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383 n.37 (1977). Thus, for purposes of applying the FDCPA to communications directly to a debtor, courts of appeals generally assess those communications from the perspective of an unsophisticated consumer (albeit with slightly varying formulations). See, *e.g.*, *Fouts* v. *Express Recovery Services, Inc.*, 602 Fed. Appx. 417, 421 (10th Cir. 2015); *Peters* v. *General Service Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002); *Gammon* v. *GC Services Limited Partnership*, 27 F.3d 1254, 1257 (7th Cir. 1994). By contrast, in cases involving communications to a debtor's attorney (or to a debtor represented by an attorney), several courts of appeals analyze those communications from the perspective of a competent attorney. See, *e.g.*, *Bravo* v. *Midland Credit Management, Inc.*, 812 F.3d 599, 603 (7th Cir. 2016); *Powers* v. *Credit Management Services, Inc.*, 776 F.3d 567, 573-574 (8th Cir. 2015); *Dikeman* v. *National Educators, Inc.*, 81 F.3d 949, 953-954 (10th Cir. 1996).

So too here, the applicable standard should turn on the intended recipient of the proof of claim. And a proof of claim filed in a bankruptcy proceeding dramatically differs from a letter sent to a debtor—or even a lawsuit filed against the debtor outside bankruptcy. A proof of claim is directed not at the debtor, but rather at the bankruptcy estate, against whose assets the claim is being made. See 11 U.S.C. 726(a); *Travelers*, 549 U.S. at 449. In bankruptcy proceedings, a trustee is assigned to each case, and it is the trustee's duty, where appropriate, to "examine

proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. 704(a)(5); see 11 U.S.C. 1302 (b)(1). In addition, the overwhelming majority of debtors—like respondent here—are represented by counsel. See Administrative Office of the United States Courts, *Bankruptcy Cases Filed by Pro Se Debtors, by Chapter, During the 12-Month Period Ending September 30, 2016*, tbl. F-28 (noting that 91.3% of debtors in Chapter 13 cases and 91.1% of debtors in Chapter 7 cases have counsel).

As a practical matter, therefore, the intended recipients of a proof of claim are the trustee, the counsel for the debtor, and the other parties in interest (including other creditors). In the rare case where a debtor is proceeding pro se, the debtor need not do anything in response to a proof of claim, because a trustee's objection—which the trustee is obligated to make, where appropriate—is sufficient for the claim to be disallowed. See 11 U.S.C. 502(a), (b). And as explained below, see pp. 35-36, an additional proof of claim, even if allowed, usually has no impact on a debtor's ultimate payments under the bankruptcy plan. Accordingly, for purposes of applying the FDCPA to a proof of claim in a bankruptcy proceeding, a court should analyze any alleged misrepresentation from the perspective of a competent trustee or attorney.

For all of the reasons set out above, a competent trustee or attorney would not be misled by a proof of claim that, like the claim at issue here, accurately discloses the required information so as to enable the parties in interest to assess the claim's timeliness. Particularly under the correct standard for measuring the accuracy of a proof of claim, this is not a close case. Because petitioner's proof of claim was in no respect "false" or "misleading," it did not violate Section 1692e.

B. Filing A Factually Accurate Proof Of Claim For An Unextinguished Time-Barred Debt In A Bankruptcy Proceeding Does Not Violate Section 1692f

For similar reasons, petitioner did not violate Section 1692f by filing a proof of claim on an unextinguished time-barred debt. That provision prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. As is relevant here, "unfair" conduct is conduct that is "[n]ot honest" or is "unjust." *Black's Law Dictionary* 1760 (10th ed. 2014). "Unconscionable" conduct is conduct that "show[s] no regard for conscience" and "affront[s] the sense of justice, decency, or reasonableness" or is "[s]hockingly unjust or unfair." *Id.* at 1757.

1. As we have just explained, there is nothing dishonest about filing an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding. And submitting such a filing—a type of filing that the Bankruptcy Code invites creditors to make—is a far cry from conduct that offends the sense of justice. Such a filing bears no resemblance to the intimidating and coercive conduct that motivated the FDCPA's enactment, such as threatening or harassing consumers, sending phony legal documents, and impersonating attorneys. See H.R. Rep. No. 1202, 94th Cong., 2d Sess. 2 (1976).

Unlike consumers who are the target of traditional debt-collection activity, debtors in bankruptcy are protected by a panoply of procedures. Every consumer bankruptcy case is assigned a trustee who is obligated to monitor proofs of claim and raise all necessary objections, and the vast majority of debtors (like respondent here) have their own counsel as an additional layer of protection. See pp. 29-30, *supra*. In addition, the claims process is highly regulated: the Code and accompanying rules establish a procedure for handling proofs of claim, require proofs of

claim to contain certain information, and prescribe sanctions for abusive or otherwise improper conduct. See, *e.g.*, 11 U.S.C. 105(a); Fed. R. Bankr. P. 3001, 3002, 3004, 3007, 9011.

Of particular relevance here, objecting to a proof of claim is a simple step that imposes only a minimal burden, as illustrated by the one-sentence objection respondent's attorney filed in response to petitioner's claim. J.A. 21; see Fed. R. Bankr. P. 3007(a) (providing that an objection need only be "in writing"). Unlike a debtor faced with defending an improper civil action brought by a debt collector or responding to a communication from a debt collector outside the legal process, a debtor in bankruptcy does not have to assemble the key facts and supporting documentation relating to the debt's timeliness. Instead, in cases such as this one, the Bankruptcy Rules place the onus on the creditor advancing the claim to maintain the relevant documentation and expend the effort of collecting and presenting those facts in the first instance. See Fed. R. Bankr. P. 3001(c)(3)(A). The rules even empower the debtor to seek additional documentation from the creditor. See Fed. R. Bankr. P. 3001(c)(3)(B).

A debtor in bankruptcy is also protected by the automatic stay, which ensures that a creditor cannot take any sort of action to collect on a preexisting claim, such as calling a debtor or sending the debtor letters in an effort to obtain a payment. See 11 U.S.C. 362(a)(6). The stay provides "breathing space" for the debtor, eliminating the potentially coercive pressures that debtors face outside the bankruptcy process. 3 *Collier on Bankruptcy* ¶ 362.03, at 362-23.

Further decreasing any intimidation or coercion, a creditor directs a proof of claim not at the debtor, but rather at the bankruptcy estate, against whose assets the claim is being made. See 11 U.S.C. 726(a); *Travelers*, 549

U.S. at 449. In most cases, the proof of claim will be filed on the docket and reviewed by the debtor's attorney; the debtor may not even see it. And as explained below, see p. 35, an additional proof of claim, even if allowed, usually has no impact on a debtor's ultimate payments under the bankruptcy plan. The filing of a proof of claim is thus far less direct, and far less likely to be intimidating and coercive, than the types of traditional debt-collection activity directed at the debtor and regulated by the FDCPA.

What is more, to the extent the FDCPA seeks to protect debtors from the embarrassment of the public airing of their debts, see, *e.g.*, 15 U.S.C. 1692c(b), 1692f(7), (8); S. Rep. No. 382, 95th Cong., 1st Sess. 4 (1977), debtors who take advantage of the bankruptcy process have already chosen to make public the fact of their debts and much of their financial information. See 11 U.S.C. 107(a); *Greene* v. *Taylor*, 132 U.S. 415, 443 (1889). In addition, because debtors choose the forum and are likely to have voluntarily initiated the proceedings, debtors are far less vulnerable inside the bankruptcy process than they would be outside it.

Finally on this score, at the conclusion of the bankruptcy process, a debt is discharged regardless of whether the corresponding claim is allowed. As discussed above, see pp. 24-25, discharge provides a debtor with broad protection from any future acts to recover the debt, as well as from various forms of discrimination based on the nonpayment of that debt. See 11 U.S.C. 524(a), 525. Even if the claim is disallowed, therefore, the inclusion of the debt in the bankruptcy process gives the debtor the fresh start contemplated by the Bankruptcy Code. See *Grogan*, 498 U.S. at 286. For all of those reasons, in addition to being accurate, a proof of claim for time-barred debt is neither unjust nor unfair.

2. Nor is it unjust or unfair that, if the trustee and the other parties in interest all fail to object, a proof of claim for an unextinguished time-barred debt could result in a payment that could have been avoided by the filing of an objection. A creditor, including a debt collector, has a right to payment on an unextinguished debt, even if it is subject to a limitations defense. See pp. 16-18, *supra*. Debt collectors may thus seek repayment on time-barred debt in various ways without violating the FDCPA, including by encouraging a debtor to make partial payment or to acknowledge the debt, or by otherwise seeking to revive a time-barred claim. See *Owens*, 832 F.3d at 732 & n.6; *Repairing a Broken System* 22-23. Just as debt collectors are within their rights to take actions directed at debtors in an effort to obtain repayment, so too are they within their rights in seeking to recover via the more indirect step of filing a proof of claim in a bankruptcy proceeding.

C. Filing A Factually Accurate Proof Of Claim For An Unextinguished Time-Barred Debt Has Little If Any Impact On A Debtor And Does Not Implicate The FDCPA's Purposes

Reading either Section 1692e or Section 1692f to bar the filing of a proof of claim for an unextinguished time-barred debt would be especially odd because a proof of claim has little if any effect on the consumers the FDCPA is meant to protect.

1. Debt recovery within bankruptcy is fundamentally different from debt collection outside bankruptcy. As discussed above, a creditor in bankruptcy makes a claim not against the debtor's assets, but against the assets of the bankruptcy estate. See p. 29, *supra*. The allowance of a claim thus affects how the assets of the estate will be divided among the creditors. While the Code provides debt-

ors with numerous protections, the claims-allowance process exists primarily to ensure fairness to *creditors*. See, *e.g.*, *Gardner* v. *New Jersey*, 329 U.S. 565, 573 (1947). To the extent the filing of a proof of claim affects a debtor at all, it will often be affirmatively beneficial, because it ensures discharge of the debt (where, as here, the debtor has failed to list the debt on the schedule accompanying the bankruptcy petition). See 11 U.S.C. 523(a)(3)(A), 1328 (c)(2). The Code even permits the debtor to file a proof of claim on behalf of a creditor that has failed to do so. See 11 U.S.C. 501(c); Fed. R. Bankr. P. 3004.

In the event a claim for a time-barred debt is ultimately allowed, moreover, it will ordinarily have no effect on the debtor. Congress "clearly contemplated [C]hapter 13 plans paying little or nothing on unsecured debts," and unsecured claims may be discharged even if the debtor "pay[s] nothing to unsecured claimants." 8 *Collier on Bankruptcy* ¶ 1328.02[3][a], at 1328-13. In most Chapter 13 cases (and virtually all Chapter 7 cases),[6] debtors pay back less than 100% of their unsecured debts—which is understandable, since debtors who can afford to pay back all of their unsecured debts generally do not need to enter bankruptcy in the first place. See *Dubois*, 834 F.3d at 531-532. In the typical Chapter 13 case, the amount the debtor pays depends on the debtor's projected income—with the result that an additional allowed claim decreases the amount available to pay other creditors, rather than increasing the amount paid by the debtor. See *ibid.* That was the case here: the bankruptcy court ultimately confirmed a repayment plan under which respondent would

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[6] In a Chapter 7 case, the allowance of an additional proof of claim generally has no effect on the debtor, because the debtor lacks any pecuniary interest in the estate. See 4 *Collier on Bankruptcy* ¶ 502.02 [2][c], at 502-13.

pay $402 per month for 60 months, amounting to approximately 77% of her outstanding unsecured debts. See p. 8, *supra*.[7]

Policing the filing of proofs of claim thus primarily affects the interests of other creditors. If anything, it is those creditors, not the debtor, that should have every incentive to object to claims they believe should be disallowed. The Bankruptcy Code plainly confers the right to object on creditors as parties in interest, 11 U.S.C. 502(a)—and, as sophisticated parties, they are more than able to protect their rights by doing so. And at the risk of stating the obvious, the FDCPA exists to protect the interests of consumers, not creditors. See 15 U.S.C. 1692(a), (b), (e), 1692a(3); S. Rep. No. 382, *supra*, at 1-2. Nothing in the text or legislative history of the FDCPA

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[7] Indeed, in light of the foregoing circumstances, respondent has not identified a concrete injury sufficient to establish Article III standing. J.A. 23-28; see *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016). Because petitioner's claim was disallowed, respondent did not have to make any payment on it. But even if the claim had been allowed, it would not have affected respondent, because allowance would not have altered the amount she was required to pay; each creditor simply received a *pro rata* share of the total pool of available assets. Respondent does not allege that she incurred any cost from her bankruptcy attorney's filing the one-sentence objection to petitioner's claim; to the contrary, it appears that respondent paid her attorney a flat fee for his services in the bankruptcy proceeding. Bankr. Ct. Dkt. 2, at 2 (Mar. 24, 2014); see Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 80 (2012) (noting that most bankruptcy attorneys are paid on a flat-fee basis). As a result, respondent has failed to establish any injury that "actually exist[s]," and she thus lacks standing to proceed with her FDCPA suit. *Spokeo*, 136 S. Ct. at 1548.

evinces an intention to govern the division of a bankruptcy estate among creditors.[8]

2. Because the filing of a proof of claim for a time-barred debt has little if any impact on a debtor, the primary beneficiaries of extending the FDCPA to that conduct would be plaintiffs' lawyers looking for technical violations of the statute in the hope of obtaining attorney's fees. This case appears to be a prime example of such lawyer-driven litigation. After respondent's bankruptcy attorney filed a one-sentence objection to petitioner's proof of claim, the bankruptcy court disallowed the claim. J.A. 9-10. Respondent thus suffered no actual injury. Yet just three days later, another attorney filed a putative nationwide class action on respondent's behalf, using what appears to have been a form complaint. J.A. 5, 23-28.

The Court should not endorse this pernicious practice. For years, courts have expressed concern about the "cottage industry" of litigation that has arisen under the FDCPA. See, *e.g.*, *Federal Home Loan Mortgage Corp.* v. *Lamar*, 503 F.3d 504, 513 (6th Cir. 2007). In fact, there has been an explosion of litigation under the FDCPA in the last few years alone: approximately 11,000 plaintiffs filed FDCPA cases in 2015, up from approximately 4,000

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[8] To be sure, the FDCPA seeks not only to "eliminate abusive debt collection practices by debt collectors," but also to "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. 1692(e). In both respects, however, the FDCPA ultimately seeks to encourage good debt-collection practices *for the benefit of the consumer*. See H.R. Rep. No. 1202, *supra*, at 5 (stating that the "object" of the FDCPA is to "protect consumers by encouraging all debt collectors to adopt an honest and ethical standard of conduct"). Any harm to one debt collector from an improperly allowed proof of claim filed by another is far removed from this concern—especially because that harm would result from the first debt collector's own failure to file an objection to the proof of claim. See 11 U.S.C. 502(a).

plaintiffs in 2007. See Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report* 15 (Mar. 2016) <tinyurl.com/cfpbannualreport>; WebRecon LLC, *Out Like a Lion ... Debt Collection Litigation & CFPB Complaint Statistics, Dec. 2015 & Year in Review* (last visited Nov. 11, 2016) <tinyurl.com/webreconyearinreview>. A disproportionate number of those cases are brought by the same small group of attorneys. See, *e.g.*, WebRecon LLC, *Do You Remember ... When September Was Still Unpredictable? Debt Collection Litigation & CFPB Complaint Stats, Sept. 2016* (last visited Nov. 11, 2016) <tinyurl.com/webreconsept2016>.

Federal statutes should not be construed for the benefit of rapacious attorneys. Yet allowing FDCPA suits for filing proofs of claim for time-barred debts would primarily serve the plaintiffs' bar, rather than the consumers the FDCPA is meant to protect. Consistent with the plain language of the statute, this Court should reject the court of appeals' outlying interpretation and hold that the FDCPA does not reach the filing of a proof of claim for an unextinguished time-barred debt.

III. TO THE EXTENT THE FDCPA COULD BE READ TO PROHIBIT FILING A PROOF OF CLAIM FOR AN UNEXTINGUISHED TIME-BARRED DEBT, THE BANKRUPTCY CODE PRECLUDES SUCH APPLICATION OF THE FDCPA

Even if the FDCPA could be read to prohibit the filing of a proof of claim for an unextinguished time-barred debt, the Bankruptcy Code would preclude that application of the FDCPA. When faced with two conflicting statutes, courts should seek to harmonize them. See *United States* v. *Estate of Romani*, 523 U.S. 517, 530-532 (1998). And where an irreconcilable conflict persists, the later-enacted statute supersedes the earlier. See *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). In this case,

both of those canons of construction point to the same conclusion: the Code precludes application of the FDCPA to the filing of a proof of claim for an unextinguished time-barred debt.

A. The FDCPA Should Not Be Interpreted To Conflict With The Bankruptcy Code

The court of appeals' interpretation of the FDCPA would interject an extraneous regime, enforced by a private right of action, into the administration of a bankruptcy estate—a subject that is comprehensively addressed by the Bankruptcy Code and committed to the bankruptcy courts. Such an interpretation would be an unwarranted and unprecedented intrusion into the bankruptcy process, and the FDCPA should not be read to reach so broadly.

1. Assuming, *arguendo*, that the FDCPA is ambiguous on the question whether filing a proof of claim for a time-barred debt is prohibited, but see pp. 25-38, *supra*, any ambiguity should be resolved against such an interpretation. Cf. Pet. App. 6a (characterizing the FDCPA as containing "ambiguity" on this point, but nevertheless holding that the FDCPA applies).

Where a statutory term is ambiguous, a court should "construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100 (1991). Even if it would be "plausible" *in vacuo* to read the FDCPA to bar the filing of proofs of claim for time-barred debts, there is no valid justification for adopting an interpretation that gives rise to a conflict with the Code, which specifically addresses and authorizes the filing of

this very type of document. See *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 868-869 (1983).[9]

If interpreted to prohibit filing a proof of claim for an unextinguished time-barred debt, the FDCPA would patently conflict with the Code, which expressly authorizes that very practice. See pp. 15-25, *supra*. Such an interpretation would also substitute the FDCPA's broader remedies in place of the Code's own carefully calibrated ones and supplant the authority of bankruptcy courts to police conduct occurring within a bankruptcy proceeding. See, *e.g.*, 11 U.S.C. 105(a); Fed. R. Bankr. P. 9011(c)(2). The Court should instead interpret the FDCPA in a manner that harmonizes it with the Code by concluding that it does not regulate bankruptcy filings of the type at issue here.

2. This Court's decision in *Kokoszka* v. *Belford*, 417 U.S. 642 (1974), strongly supports the foregoing approach. In *Kokoszka*, the Court addressed whether the limitation on the garnishment of wages under the Consumer Credit Protection Act (CCPA) applied to certain property in a bankruptcy proceeding. See *id.* at 648-652. The Court recognized that the CCPA and the bankruptcy laws must be interpreted to "coexist." See *id.* at 650. The bankruptcy laws, the Court explained, create a "delicate

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[9] That canon applies with particular force where, as here, the ambiguous statute is the earlier-enacted one. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 330 (2012) (explaining that "the implication of a later enactment * * * will often change the meaning that would otherwise be given to an earlier provision that is ambiguous").

balance of a debtor's protections and obligations." *Id.* at 651. In enacting the CCPA, by contrast, Congress was not concerned with "the *administration* of a bankrupt's estate," but rather with "the *prevention* of bankruptcy in the first place." *Id.* at 650. On that basis, the Court construed the CCPA garnishment provision to apply only outside bankruptcy proceedings and not within bankruptcy. See *id.* at 651-652.

So too here. Like the CCPA—the statute to which Congress subsequently added the provisions constituting the FDCPA—the FDCPA was intended to prevent bankruptcy. 15 U.S.C. 1692(a). Nothing in its text or legislative history reflects any intent to interfere with the "delicate balance" of the bankruptcy system itself, by operating directly on the administration of an estate within the framework of a bankruptcy proceeding. *Kokoszka*, 417 U.S. at 651. Accordingly, while the FDCPA, like the rest of the CCPA, governs a debt collector's conduct outside the four corners of a bankruptcy proceeding (whether before, during, or after bankruptcy), it is better understood to have no application to the debt collector's conduct within such a proceeding—at least where, as here, the Code itself specifically authorizes that conduct.

In addition, the FDCPA should not lightly be read to intrude upon the Code's operation because the Code aims to be comprehensive and uniform, whereas the FDCPA does not. As discussed above, see pp. 18-20, the Bankruptcy Code establishes an "elaborate framework" governing the claims filing and resolution process within a bankruptcy proceeding. Cf. *Elgin* v. *Department of Treasury*, 132 S. Ct. 2126, 2133 (2012) (citation omitted). Consistent with the Bankruptcy Clause of the Constitution, see U.S. Const. Art. I, § 8, cl. 4, the federal bankruptcy laws also prize uniformity and exclude conflicting state laws. See *International Shoe Co.* v. *Pinkus*, 278

U.S. 261, 265, 268 (1929); *Stellwagen* v. *Clum*, 245 U.S. 605, 613 (1918). By contrast, the FDCPA does not seek to "foreclose the States from enacting or enforcing their own laws regarding debt collection" as long as they impose stronger standards. S. Rep. No. 382, *supra*, at 6; see 15 U.S.C. 1692n. And the FDCPA is enforced primarily through a private right of action, 15 U.S.C. 1692k, which inevitably produces "wide variations" in issued decisions. *Elgin*, 132 S. Ct. at 2135 (citation omitted). A "comprehensive" scheme, like that in the Bankruptcy Code, "represents Congress' detailed judgment" and should control absent some clear indication to the contrary. *Estate of Romani*, 523 U.S. at 530-532.

Finally on this point, allowing FDCPA suits in this context would effectively create a remedy that Congress chose not to make available in the Code: namely, a private right of action for abusive or otherwise improper conduct within a bankruptcy proceeding. The Code permits a bankruptcy court to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a). Notably for present purposes, however, that provision does not permit parties in interest to bring separate suits to enforce its terms. See, *e.g.*, *In re Kalikow*, 602 F.3d 82, 97 (2d Cir. 2010); *In re Joubert*, 411 F.3d 452, 455 (3d Cir. 2005); *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002); *Bessette* v. *Avco Financial Services, Inc.*, 230 F.3d 439, 445 (1st Cir. 2000), cert. denied, 532 U.S. 1048 (2001).

Allowing debtors to bring FDCPA suits for the filing of proofs of claim for time-barred debts would amount to authorizing a private right of action to challenge purportedly improper conduct within a bankruptcy proceeding where the Code does not provide for one—never mind that it would do so where the Code specifically condones,

rather than condemns, the conduct at issue. That would violate the "elemental canon of statutory construction" that, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979); see *Armstrong* v. *Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015). The Court should not open the Code to enforcement through private rights of action that would inevitably give rise to the very disuniformity the bankruptcy laws are designed to prevent.

B. If The FDCPA Is Interpreted To Conflict With The Bankruptcy Code, It Must Yield To The Later-Enacted Code

Finally, even if the Court were to conclude that the FDCPA unambiguously reached the filing of a proof of claim for a time-barred debt, it should hold that the application of the FDCPA must yield because it would create an irreconcilable conflict with the later-enacted Bankruptcy Code. See *Posadas*, 296 U.S. at 503. While "repeals by implication are not favored," *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 193 (1968), this Court has long recognized that an implied repeal will be found where the interpretation of the earlier-enacted statute giving rise to the conflict with the later-enacted one does not appear in the "express statutory text." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

Because the conflicting application of the FDCPA does not appear in the statutory text but has arisen only through judicial interpretation, Congress had no reason specifically to address that application when it enacted the Bankruptcy Code in 1978. See *Fausto*, 484 U.S. at 453. Indeed, it would have required an act of clairvoyance for

Congress to have anticipated this conflict between the FDCPA and the Bankruptcy Code, given that no one so much as sought to apply the FDCPA to bankruptcy proceedings until many years later. In fact, we are not aware of a single FDCPA suit challenging the filing of a proof of claim in bankruptcy in the first two decades after the Code's enactment.

The judicial interpretation of the FDCPA adopted by the Eleventh Circuit gives rise to an inescapable conflict with the Bankruptcy Code, because the Code entitles a debt collector to take an action that the interpretation would prohibit. The Bankruptcy Code provides that any "creditor"—which plainly includes a debt collector, see 11 U.S.C. 101(10)(A)—"may file a proof of claim." 11 U.S.C. 501(a). As explained above, that includes a proof of claim on an unextinguished time-barred debt. See pp. 16-18, *supra*. Thus, the Code authorizes—or, in this Court's words, "entitle[s]," *Travelers*, 549 U.S. at 449—a debt collector to file such a proof of claim. By contrast, if the FDCPA applies to the filing of such a proof of claim, it would "prohibit[]" that conduct altogether. See *Sheriff*, 136 S. Ct. at 1598; *Heintz* v. *Jenkins*, 514 U.S. 291, 292 (1995). The Code would thus entitle a debt collector to take an action that the FDCPA by judicial interpretation prohibits.

That type of conflict is so irreconcilable that it would repeal even express statutory text, much less a judicial interpretation. See *Credit Suisse Securities (USA) LLC* v. *Billing*, 551 U.S. 264, 273 (2007) (explaining that a "conflict" is "clear" where the earlier-enacted law "forbid[s] the very thing that the [later-enacted law] had then permitted"); *Branch* v. *Smith*, 538 U.S. 254, 291 (2003) (Stevens, J., concurring in part and concurring in the judgment) (noting that, "[a]s a matter of plain English, the conflict between [one statute's] prohibition [against at-large elections] and [another statute], which permitted at-

large elections, is surely irreconcilable"). As Justice Scalia colorfully put it in his treatise on statutory interpretation, "[w]hen a statute specifically permits what an earlier statute prohibited, or prohibits what it permitted, the earlier statute is (no doubt about it) implicitly repealed." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 327 (2012). This Court has explained that implied repeal is warranted even where there is a mere "threat" that applying an earlier-enacted statute would require certain parties to avoid actions that the later-enacted statute "permits or encourages." *Credit Suisse*, 551 U.S. at 279, 282. *A fortiori*, the clear conflict created by the Eleventh Circuit's interpretation of the FDCPA suffices to warrant implied repeal here.

The Code's legislative history provides further support for that conclusion. Before the 1978 Code, Congress effectively limited the claims that could be brought into bankruptcy proceedings by imposing a provability requirement. See 11 U.S.C. 103 (1976); Bankruptcy Act of 1898, ch. 541, § 63(a), Pub. L. No. 55-541, 30 Stat. 562-563. In the 1978 Code, however, Congress sought markedly to expand the definition of a "claim" and thus the comprehensiveness of the claims process. Congress jettisoned the provability requirement in favor of the "broadest possible definition" of "claim," so as to ensure that all debts could "be dealt with in the bankruptcy case" and to "permit[] the broadest possible relief in the bankruptcy court." H.R. Rep. No. 595, *supra*, at 309. By Congress's own recognition, that represented a "significant departure" from then-existing law. *Ibid.* It would be inconsistent with Congress's objective to construe an earlier-enacted, non-bankruptcy statute to limit the proofs of claim that can be filed in a bankruptcy proceeding.

* * * * *

The straightest path to a reversal of the judgment below is simply to hold that the FDCPA does not reach the filing of a proof of claim for an unextinguished time-barred debt. But if the FDCPA were read to have that reach, applying the FDCPA to the filing of such a proof of claim would create an impermissible conflict with the later-enacted Bankruptcy Code. In either event, the Eleventh Circuit's application of the FDCPA to a proof of claim for an unextinguished time-barred debt is improper. This Court should therefore reverse the Eleventh Circuit's outlying judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

11 U.S.C. 101 provides in relevant part:

In this title the following definitions shall apply:

* * *

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; * * * .

* * *

(10) The term "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor; * * * .

* * *

(12) The term "debt" means liability on a claim.

11 U.S.C. 501 provides in relevant part:

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest. * * *

11 U.S.C. 502 provides in relevant part:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (c)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured; * * * .

11 U.S.C. 558 provides in relevant part:

The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

11 U.S.C. 704 provides in relevant part:

(a) The trustee shall—

* * *

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper * * * .

11 U.S.C. 1302 provides in relevant part:

* * *

(b) The trustee shall—

(1) perform the duties specified in sections 704(a)(2), 704(a)(3), 704(a)(4), 704(a)(5), 704(a)(6), 704(a)(7), and 704(a)(9) of this title * * * .

15 U.S.C. 1692 provides:

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive

debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. 1692e provides in relevant part:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. * * *

15 U.S.C. 1692f provides in relevant part:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by

the agreement creating the debt or permitted by law.
* * *

Federal Rule of Bankruptcy Procedure 3001 provides in relevant part:

(a) Form and content

A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

* * *

(c) Supporting information

* * *

(3) Claim based on an open-end or revolving consumer credit agreement

(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.
* * *

Federal Rule of Bankruptcy Procedure 9011 provides in relevant part:

* * *

(b) **Representations to the court**

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. * * *

RECORD
AND
BRIEFS

No. 16-348

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

This case directly implicates two circuit conflicts concerning the interaction of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and the Bankruptcy Code.

In *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), cert. denied, 135 S. Ct. 1844 (2015), in the context of a Chapter 13 bankruptcy, the Eleventh Circuit held that filing a proof of claim on a knowingly time-barred debt violates the FDCPA. That holding has given rise to a square and entrenched circuit conflict, and it has sharply divided panels on multiple courts of appeals.

In the decision below, the Eleventh Circuit reaffirmed *Crawford*, while also holding (in direct conflict with the Ninth Circuit and in clear tension with the Second Circuit) that the FDCPA claim found viable in *Crawford* was not impliedly repealed by the Bankruptcy Code. These same issues have hopelessly divided scores of district and bankruptcy courts nationwide, and the issues affect hundreds (if not thousands) of cases implicating potentially billions of dollars annually.

The questions presented are:

1. Whether filing a proof of claim on a knowingly time-barred debt violates the FDCPA.

2. Whether any such claim under the FDCPA is impliedly repealed by the Bankruptcy Code.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

This case implicates two "closely related" questions (Pet. 9) of exceptional legal and practical importance that have openly divided the courts of appeals. As respondent will explain upon plenary review, the Eleventh Circuit's disposition of each question was correct. But in light of the clear circuit conflict, the issue's obvious significance, and the urgent need for this Court's guidance, respondent agrees with petitioner that review is plainly warranted.

There is also a pending petition for a writ of certiorari in *Owens* v. *LVNV Funding, LLC*, No. 16-315 (filed Aug. 26, 2016), which arises on materially indistinguishable facts and presents the same opportunity to address the common questions presented here. The Court should grant review in this case or in *Owens*, and hold the other petition pending the conclusion of this Court's review.

ARGUMENT

A. There Is A Clear And Intractable Circuit Conflict On Each Question Presented

In its decision below, the court of appeals correctly held that petitioner's conduct violates the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and that respondent's FDCPA claim is not precluded by the Bankruptcy Code. As petitioner explained, the courts of appeals have sharply divided over these issues (Pet. 10-16), and the conflict warrants this Court's immediate intervention.

1. It is undisputed that "[t]here is a circuit split on the issue of whether filing a proof of claim on a stale debt in bankruptcy" violates the FDCPA. *Owens* v. *LVNV Funding, LLC*, ___ F.3d ___, 2016 WL 4207965, at *5 (7th Cir. Aug. 10, 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016). The Eleventh Circuit has now twice held that such conduct violates the FDCPA as "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f." *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1260 (11th Cir. 2014), cert. denied, 135 S. Ct. 1844 (2015); Pet. App. 9a ("a debt collector violates the FDCPA by filing a knowingly time-barred proof of claim in a Chapter 13 bankruptcy proceeding").

Three other circuits—two by sharply divided panels—have expressly rejected the Eleventh Circuit's holding. See *Dubois* v. *Atlas Acquisitions LLC (In re Dubois)*, ___ F.3d ___, 2016 WL 4474156, at *6 & n.6 (4th Cir. Aug. 25, 2016) ("The Eleventh Circuit in *Crawford* is the only court of appeals to hold that filing a proof of claim on a time-barred debt in a Chapter 13 proceeding violates the FDCPA."); *Owens*, 2016 WL 4207965, at *5-*6 ("Like the Eighth Circuit, we decline to follow the

Eleventh Circuit's approach."); *Nelson* v. *Midland Credit Mgmt., Inc.*, ___ F.3d ___, 2016 WL 3672073, at *2 (8th Cir. July 11, 2016) (refusing to "follow the Eleventh Circuit" and "reject[ing] extending the FDCPA to time-barred proofs of claim"); see also *Dubois*, 2016 WL 4474156, at *9 (Diaz, J., dissenting) (following *Crawford* and rejecting *Nelson* as "[un]persua[sive]"); *Owens*, 2016 WL 4207965, at *10 (Wood, C.J., dissenting) ("I would align this court with the Eleventh Circuit, rather than the Second and Eighth") (citations omitted).

This conflict is both express and intractable. Within the past month, two circuits—the Eleventh and Eighth—have refused to reconsider their positions, each denying rehearing en banc (without a *single* judge requesting a vote) even after contrary circuit authority was explicitly called to the full court's attention. There accordingly is no point in further percolation: given the "existing circuit split," remaining circuits "need only to line up on one side or the other." *Owens*, 2016 WL 4207965, at *10 (Wood, C.J., dissenting). The conflict is clear and entrenched, and it merits the Court's review.

2. In the decision below, the Eleventh Circuit also held that "[t]he Bankruptcy Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred." Pet. App. 7a ("answer[ing] the question left open in *Crawford*"). This separate holding conflicts with settled law in the Ninth Circuit, and it is incompatible with established precedent in the Second Circuit.

a. While the Eleventh Circuit (correctly) held that "the Code and the FDCPA can be read together in a coherent way," the Ninth Circuit reached precisely the opposite conclusion in *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002). In *Walls*, the Ninth Circuit adopted the sweeping theory that the FDCPA is cate-

gorically "precluded" in the bankruptcy setting. 276 F.3d at 510-511. According to *Walls*, "'[a] mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code * * * demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike.'" *Id.* at 510 (quoting *MSR Exploration, Ltd.* v. *Meridian Oil Inc.*, 74 F.3d 910, 914 (9th Cir. 1996)). *Walls* found that "[w]hile the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code." *Ibid.* It thus held that any remedy for bankruptcy-related misconduct "lies in the Bankruptcy Code," and "[n]othing in either Act persuades us that Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA." *Id.* at 510-511.[1]

Although *Walls* involved a different FDCPA claim—an alleged violation of the Code's discharge injunction—its categorical holding would be dispositive in this factual context: because *any* FDCPA claim arising in the bankruptcy setting is "precluded" under *Walls*, respondent's FDCPA claim would automatically be precluded as well. And, indeed, that was the precise conclusion reached by the Ninth Circuit's Bankruptcy Appellate Panel: "Application of the FDCPA to this conduct"—"B-Real's act of

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[1] *Walls*'s categorical holding itself has squarely divided the courts of appeals, reflecting the broad confusion these issues have generated at the circuit level. See, *e.g.*, *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730-733 (7th Cir. 2004) ("[t]he Bankruptcy Code of 1986 does not work an implied repeal of the FDCPA"); *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 273-274 (3d Cir. 2013) (rejecting *Walls* and "follow[ing] the Seventh Circuit's approach").

filing a [time-barred] proof of claim in the pending bankruptcy case"—"would certainly conflict with the Code." *B-Real, LLC* v. *Chaussee (In re Chaussee)*, 399 B.R. 225, 237 (B.A.P. 9th Cir. 2008); see also *id.* at 214 ("we are convinced that the Code and Rules are up to the task of compensating a debtor for any damages or costs occasioned by, and to punish and deter, those who would abuse the bankruptcy claims process"). As *Chaussee* found, "we believe *Walls* compels our holding that Debtor's claim against B-Real under FDCPA is precluded by the Code." *Id.* at 241.[2]

b. In *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010), the Second Circuit held that an "inflated" proof of claim "cannot form the basis for a claim under the FDCPA," reasoning that the claims-process is controlled exclusively by the Code. 622 F.3d at 94-96. While *Simmons* did not confront the identical conduct at issue here—a scheme to flood bankruptcy courts with knowingly time-barred claims—its logic is incompatible with the Eleventh Circuit's decision, and it would effectively foreclose respondent's claim in the Second Circuit.[3]

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[2] This Court routinely considers decisions of bankruptcy appellate panels in describing conflicts warranting the Court's review. See, *e.g.*, *Schwab* v. *Reilly*, 130 S. Ct. 2652, 2659 & n.4 (2010).

[3] Petitioner discusses *Simmons* in explaining the split on the first question presented (Pet. 13), but *Simmons* is best understood as relevant to the second question (*i.e.*, whether the Code impliedly repealed the FDCPA in this context). *Simmons* relied directly on "preclusion" case law (including *Walls*), and invoked a preclusion-based rationale (*e.g.*, refusing to "supplement the remedies afforded by bankruptcy itself"). 622 F.3d at 96-97. While the Second Circuit later suggested that *Simmons* did not find an "implied[] repeal," it also admitted that *Simmons* "construe[d] FDCPA provisions to be inapplicable when invoked for claims made during bankruptcy" and found FDCPA claims "preclu[ded] * * * prior to discharge." *Gar-*

In sum, it is beyond clear that the outcome below would have been exactly the opposite had this case arisen in the Ninth or Second Circuits. The split on this second question is not as dramatic as the split on the first question, but the conflict is still persistent and unequivocal. This issue has been exhaustively developed by the Eleventh Circuit and district court in this case, and it has been extensively addressed in the lower courts. See, *e.g.*, Pet. 15-16, 19. It reflects the same degree of intolerable confusion over an exceedingly important question of federal law, and there is no basis for thinking the split will resolve itself. This question, like the first question, warrants the Court's review.[4]

B. The Questions Presented Are Exceptionally Important And Frequently Recurring

As explained in this petition (at 16-18) and the *Owens* petition (at 17-18 & nn.6-7, 29-31), the questions presented are of extraordinary legal and practical significance. Petitioner's scheme has produced a "deluge" of claims "swe[eping] through the U.S. bankruptcy courts." *Crawford*, 758 F.3d at 1256. This scenario now arises "all the time": "The issue is a real one, the problem is wide-

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field v. *Ocwen Loan Servicing, LLC*, 811 F.3d 86, 90-91 (2d Cir. 2016). *Simmons* is most naturally understood as holding (incorrectly) that the Code precludes the FDCPA in this context.

[4] As noted at the outset, respondent will address the merits of these issues at the merits stage. As part of that presentation, respondent, for example, will explain why petitioner's claims are not truly "'accurate and complete'" (Pet. 11)—despite disclosing truthful information on their face—as "they are mum about the unenforceability of the debt" (*Owens*, 2016 WL 4207965, at *10 (Wood, C.J., dissenting)). And respondent will also explain why petitioner's knowingly time-barred claims are *not* "allowed by the Bankruptcy Code" (Pet. 17).

spread, and it burdens both debtors and the courts." *Jenkins* v. *Genesis Fin. Solutions, LLC (In re Jenkins)*, 456 B.R. 236, 239 n.2, 241 (Bankr. E.D.N.C. 2011). It arises in countless Chapter 13 bankruptcies, implicating potentially billions of dollars of debt. See No. 16-315 Pet. 29-30. And in light of the deep conflict, parties on all sides lack notice of their rights, frustrating the efficient administration of bankruptcy cases nationwide.

This Court rarely permits even shallow conflicts to persist in the bankruptcy context. See Pet. 18 (citing cases). There are compelling reasons to resolve these significant disputes now.

C. Both This Case And *Owens* Are Excellent Vehicles For Considering The Questions Presented

Even though the Eleventh Circuit resolved both questions correctly, this case still presents a highly suitable vehicle for resolving these important questions.

As in *Owens*, every material fact here is undisputed, and it presents the quintessential fact-pattern dividing the courts nationwide. The case was resolved on the pleadings, turning on pure questions of law. Each question was squarely resolved after the courts were presented with the full range of arguments. And the court of appeals resolved *both* questions, which (as petitioner explained) are ideally addressed in tandem.[5]

---

[5] While respondent agrees that the Court should grant and resolve both "closely related" questions (Pet. 18-19), given the expansive confusion on the first question presented, there would still be significant value to resolving that question now, even if the Court elects to let the second question percolate. As described above, however, additional percolation is neither necessary nor useful: the split between the Eleventh Circuit and the Second and Ninth Circuits is clear and intractable, and the broader issues have been extensively treated in their own right (in light of the related conflict over *Walls*'s

The Court could also instead grant review in *Owens*, where the same questions are factually presented. While the *Owens* petition did not raise the second question presented (*i.e.*, whether the Code impliedly repealed the FDCPA in this setting), the issue was raised by the *Owens* respondents in district court (see, *e.g.*, No. 16-315 Pet. App. 65a), and the *Owens* petitioners explicitly invited the Seventh Circuit to resolve it on appeal (C.A. Reply Br. 29-31 ("To avoid confusion on any remand, the Court should address this issue and reaffirm that there is no preclusion under the controlling standard.")). There is no clear obstacle to the Court adding the second question as an alternative ground supporting affirmance.

Whether the Court grants review in this case or *Owens*, however, review is appropriate now: the division among the lower courts is staggering, and the resulting confusion is intolerable. These issues have been exhaustively addressed—including by multiple split panels—and both *Owens* and *Johnson* present excellent vehicles for resolving these questions. There is no point in waiting to see how other circuits line up on the existing circuit conflicts.

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categorical holding, see p. 4 n.1, *supra*). Further percolation will only add more confusion; there is no reason to believe it will somehow clear up the existing conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition in *Owens* should be granted and this case should be held pending *Owens*'s disposition.

Respectfully submitted.

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Ala. Code § 6-2-30(a) 40

Miscellaneous:
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Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change* (Federal Trade Commission 2010) 9
Fed. Trade Comm'n, *The Structures and Practices of the Debt Buying Industry* (2013) 10, 11, 12, 15
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 43
Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, Wall Street Journal (Nov. 28, 2010) 12, 13
Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 Loy. Consumer L. Rev. 355 (2012) 12
Lisa Stifler & Leslie Parrish, *The State of Lending in America & its Impact on U.S. Households: Debt Collection & Debt Buying* (Center for Responsible Lending 2014) 9, 10, 11, 12
Nat'l Consumer Law Ctr., *Comment to the Federal Trade Commission Regarding the Fair Debt Collection Practices Act* (Aug. 1, 2009) 12

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Miscellaneous—continued:

Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. Bus. & Tech. L. 259 (2011) 12, 13

S. Rep. No. 382, 95th Cong., 1st Sess. (1977) 4

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In the Supreme Court of the United States

No. 16-348

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

INTRODUCTION

The Fair Debt Collection Practices Act (FDCPA) regulates a narrow class of actors who face adverse incentives: professional consumer-debt collectors. To protect innocent consumers, the FDCPA prohibits "deceptive" or "unfair" practices in connection with the collection of a debt. For example, lower courts have widely held that filing suit to recover on a time-barred debt violates the Act. The reason is obvious: such lawsuits seek to unfairly frighten or deceive consumers into paying a stale debt where they have no legal obligation to do so.

Petitioner in this case is a professional consumer debt collector. Its tactics here are more sophisticated, but equally cynical. Petitioner uses the bankruptcy claim process—where claims are cheap to file and presumptively valid—as a means to collect on knowingly time-

barred debts, fully aware that the relevant stakeholders (debtors, their counsel, and bankruptcy trustees) will often fail to object. Indeed, that is the only reason that petitioner's business makes money: because it is *certain* that some time-barred debts will slip through. Petitioner effectively admits that if the bankruptcy system functioned as Congress intended, these claims would be rejected 100 percent of the time.

Petitioner's brief is perhaps most telling for what it does not say. It does not contest that petitioner and its peers file claims in the hope of collecting unenforceable debts. It does not argue that they have any good-faith basis for these filings or any legitimate response once anyone objects. In fact, petitioner does not discuss the troubling industry practice at issue here at all.

Instead, petitioner argues that the Bankruptcy Code (and its underlying policies) somehow immunizes its behavior. Petitioner's arguments, however, misapprehend the law and are predicated on clear misrepresentations about the realities of the consumer-bankruptcy system.

Petitioner wrongly suggests, for example, that consumers are not hurt by its illegitimate claims; only other creditors are. Not so. For example: most Chapter 13 plans fail, leaving the debtor obligated to pay her debts in full. Monies wasted on time-barred debts wrongly included in the failed Chapter 13 plan leaves the debtor with a higher outstanding obligation to her real, surviving creditors than if her resources had not been siphoned away by illegitimate debt. And money paid on stale debts reduces the amount the debtor has to satisfy legitimate non-dischargeable debts, like child support or student loans. Of course, illegitimate claims also harm everyone by increasing the costs of our bankruptcy system.

Nor, as petitioner remarkably suggests, does presentment of a time-barred debt somehow affirmatively *benefit* the debtor by promoting a "fresh start." Those debts are already a practical nullity, and in any event scheduling these claims would not have the benefit that petitioner alleges.

Finally, the trustee's presence does not exculpate petitioner or legitimize its conduct. Trustees neither have infinite time nor offer it free of charge, which means—as petitioner well knows—that the estate and its trustee face a limited economic incentive to carefully scrutinize smaller claims. It is deceptive and unfair for petitioner to exploit *en masse* that systemic reality in an effort to collect on expired debts—which is exactly why the U.S. Trustee has sued Resurgent Capital Services, L.P.—the defendant in the companion case before the Eleventh Circuit below and an *amicus* supporting petitioner in this Court.

STATEMENT

This case presents fundamental questions concerning the interaction of the FDCPA and the Bankruptcy Code. As such, respondent begins with a brief examination of those two statutory regimes followed by a brief discussion of the relevant factual and procedural history of this case.

A. Statutory Background

1. Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. 1692(e). It recognized both the egregious conduct of "a small segment" of independent debt collectors and

the blamelessness of their targets—"the number of persons who willfully refuse to pay *just* debts is miniscule." S. Rep. No. 95-382, at 3 (1977) (emphasis added).

The Act accordingly regulates a narrow class of actors: professional consumer debt collectors.[1] Congress recognized that unlike original creditors, these third-party debt collectors would not feel "restrained by the desire to protect their good will" or "[]concerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2. They have the "incentive to collect by any means." *Ibid.*

In regulating that narrow class of actors, the FDCPA imposes broad prohibitions. See *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 587 (2010). It provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. It separately forbids the use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. In both sections, the Act contains non-exhaustive lists of abusive collection practices. See S. Rep. No. 95-382, at 4 ("This will enable courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."). And the enumerated practices themselves reflect the expanse of prohibited

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[1] The Act defines "debt collector" as any person whose business has the "principal purpose" of debt collection or who "regularly" collects debts "due another." 15 U.S.C. 1692a(6); see, *e.g.*, S. Rep. No. 95-382, at 3 ("The primary persons intended to be covered are independent debt collectors."). The Act defines "debt" to mean a primarily "personal, family or household" obligation of a "consumer," and in turn defines "consumer" as a "natural person." 15 U.S.C. 1692a(3), (5); see, *e.g.*, S. Rep. No. 95-382, at 3 ("This bill applies only to debts contracted by consumers for personal, family, or household purposes; it has no application to the collection of commercial accounts.").

conduct, outlawing not only aggressive, intimidating tactics but also more subtle efforts to deceive the debtor.[2]

Congress included a private right of action and statutory damages to incentivize private policing.[3] However, Congress sharply limited the damages recoverable in class actions to prevent over-enforcement.[4] Importantly, Congress also provided an affirmative defense to debt collectors who implement "procedures reasonably adapted to avoid" violations of the Act. 15 U.S.C. 1692k(c).

2. Once a debtor files for bankruptcy, a bankruptcy estate is created that consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). Creditors who wish to recover from the estate "may file a proof of claim," 11 U.S.C. 501(a), which is "a written statement setting forth a creditor's claim." Fed. R. Bankr. P. 3001. The Code defines a "claim" as a "right to payment, whether or not such right is * * * fixed, contingent, matured, unmatured, disputed, [or] undisputed." 11 U.S.C. 101(5)(A).

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[2] For example, those efforts include falsely representing the "character, amount, or legal status of the debt"; using "deceptive means to collect or attempt to collect any debt"; and collecting an amount that is not "expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. 1692e(2), (10), 1692f(1).

[3] In an individual action, a consumer may recover actual damages plus statutory damages up to one thousand dollars. 15 U.S.C. 1692k(a)(1), (2)(A). A successful plaintiff may recover costs and attorneys' fees. 15 U.S.C. 1692k(a)(3).

[4] In a class action, statutory damages for the class members other than the named plaintiffs may not exceed the lesser of $500,000 or 1% of the debt collector's net worth. 15 U.S.C. 1692k(a)(2)(B). A successful class plaintiff may also recover costs and attorneys' fees. 15 U.S.C. 1692k(a)(3).

Filing a proof of claim is easy and free. Creditors file claims on a simple, standardized 3-page form. See Fed. R. Bankr. P. 3001(a)-(b) & 3002(c). No filing fee or attorney is required.[5] For most consumer credit agreements, creditors need not even attach any underlying documentation when they submit their claim. See Fed. R. Bankr. P. 3001(c)(3)(A). A copy of the agreement—which would include any choice-of-law provision—must be provided only on written request. See *id.* 3001(c)(3)(B).

Unlike filing claims, *objecting to* claims is time-consuming and costly.[6] The objector must make a written objection, notice a hearing, and serve multiple parties. Fed. R. Bankr. P. 3007(a); see *id.* 9014. The objector then must attend the hearing and overcome the claim's prima facie validity. Finally, a formal order disallowing the claim must be prepared and served. *Id.* 9022(a).

Debtors regularly fail to object to patently time-barred claims. This is true for various reasons. For example, some debtors are *pro se*.[7] And many others are represented by counsel who are paid a flat fee for services that often do not include examining proofs of claim or filing objections.

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[5] PACER even provides "large claims filers" the ability to file claims electronically in "batches." See *Description of the Process for Electronic Filing of Bankruptcy Claims Information in CM/ECF by Creditors* (April 16, 2013).

[6] A proof of claim is subject to objection by any "party in interest" (the debtor, another creditor, or the bankruptcy trustee). 11 U.S.C. 502(a).

[7] See, *e.g.*, *Owens* v. *LVNV Funding, LLC*, 832 F.3d 726, 740 (7th Cir. 2016) (Wood, J., dissenting) (noting that 9% of bankruptcy filings in the Northern District of Illinois were *pro se*); U.S. Bankr. Court for the Cent. Dist. Cal., *Annual Report* 17 (2015) (noting that 37.5% of Chapter 13 petitions were *pro se*).

Trustees in consumer bankruptcy cases also regularly fail to object to patently time-barred claims. It is important to understand why: Bankruptcy trustees are statutorily obligated to "examine proofs of claims," but they must object to improper claims only "if a purpose would be served." 11 U.S.C. 704(a)(5); 11 U.S.C. 1302(b)(1) (imposing the same duty on Chapter 13 trustees). Even when the facts included on a proof of claim would indicate that the underlying debt is patently time-barred, it is often economically imprudent for a trustee to spend time examining and objecting to such a claim. Objecting to improper, low dollar-value claims is often counterproductive because the trustee's expenses get passed on to other parties.[8] These expenses are paid before most unsecured claims in a Chapter 7 bankruptcy (11 U.S.C. 726(a)(1)-(2)), and are entitled to "full payment" by the debtor in a Chapter 13 case (11 U.S.C. 1322(a)(2). An objection thus shrinks the pool of resources available to satisfy meritorious debts or, in a Chapter 13 case, may make plan confirmation less likely if the cost exceeds the savings from disallowing the claim.

The failure of debtors and trustees to object to patently time-barred debt results in the allowance of claims that are, in fact, unenforceable. That is true because the filing of a proof of claim is "prima facie" evidence of its

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[8] The Code allows the trustee's counsel compensation and reimbursement for her services and expenses. See 11 U.S.C. 327(a) (providing that the trustee may retain counsel), 330(a)(1) (providing for "reasonable compensation for actual, necessary services" and "reimbursement for actual, necessary expenses"); 503(b)(2) (permitting an administrative expense for "compensation and reimbursement" under Section 330(a)), 507(a)(2) (establishing priority for administrative expenses).

validity. Fed. R. Bankr. P. 3001(f). As such, any claim is automatically "allowed" unless a party in interest objects and satisfies her burden to show that "such claim is unenforceable against the debtor * * * under any agreement or applicable law." 11 U.S.C. 502(a), (b)(1). And Congress specifically included "statutes of limitation" as one means of proving unenforceability. 11 U.S.C. 558.

Allowing improper claims in bankruptcy proceedings has an obvious, significant, and negative economic impact on innocent creditors. The precise mechanism of that effect depends on whether Chapter 7 or Chapter 13 governs. A Chapter 7 bankruptcy entails the liquidation of the debtor's (non-exempt) property, where the proceeds go first to priority creditors with the surplus distributed to allowed, unsecured claims on a pro rata basis. See 11 U.S.C. 726(a)(1)-(2). Every allowed claim thus decreases the amount of funds available to pay down other claims. A Chapter 13 bankruptcy provides a debtor who has regular income a discharge of debts by using her income to satisfy claims; she must either pay all unsecured claims in full or use her disposable income to make pro rata payments to those claimholders over several years. See 11 U.S.C. 1325(b). In either situation, every allowed claim decreases the amount of funds available to satisfy other claims.

Contrary to the factual assertions of petitioners, allowing improper claims in bankruptcy also has significant and negative consequences for innocent debtors. Two such situations are notable:

First, most Chapter 13 debtors (like respondent) default under their payment plans. Except under narrow circumstances, these debtors do not obtain a discharge of *any* debts. See 11 U.S.C. 1328(a)-(b). The pro rata distribution of payments to creditors thus matters deeply—an allowed illegitimate claim siphons a dollar from a legiti-

mate claim. When the plan fails, the debtor is stuck with larger legitimate debts than had the (illegitimate) claim been properly disallowed.

Second, some important debts (like student loans and domestic support obligations) are generally not dischargeable in bankruptcy (either Chapter 7 or Chapter 13). See 11 U.S.C. 523(a), 1328(a)(2). Again, every dollar allocated to an improperly allowed claim (like a time-barred obligation) cannot pay down a legitimate, nondischargeable debt. Accordingly, regardless of the plan's success, allowing an indisputably time-barred claim leaves the debtor with larger debts than she should have.[9]

B. Factual Background

1. Debt buyers like petitioner represent "[t]he most significant change in the debt collection business in recent years." Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change* 13 (Federal Trade Commission 2010) (FTC 2010 Report).[10] Although hundreds of entities operate in this area, the industry remains substantially concentrated, with just nine firms—including petitioner's parent company Encore Capital Group ("Encore")—responsible for over 76% of all debt purchases in 2008. Fed. Trade Comm'n, *The Structures*

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[9] Further, in limited circumstances in both Chapter 7 and Chapter 13 bankruptcies, surplus may remain for the debtor. See 11 U.S.C. 726(a)6); 11 U.S.C. 1325(b)(1)(A). In those scenarios, improperly allowed claims reduce that surplus.

[10] Industry revenues have exploded: Between 2003 and 2012, petitioner's parent company realized a 373% increase, while another major player saw nearly 600% growth. Lisa Stifler & Leslie Parrish, *The State of Lending in America & its Impact on U.S. Households: Debt Collection & Debt Buying* 6 (Center for Responsible Lending 2014).

and Practices of the Debt Buying Industry 7, 13 (2013) (FTC 2013 Report).[11]

Debt buyers purchase charged-off debt from creditors "for pennies-on-the-dollar." Stifler & Parish at 2. Credit-card debt is most common,[12] but professional buyers also acquire student loans, medical debt, utility and phone bills, tax liens, car loans, and mortgage and auto deficiencies. *Id.* at 3. Debts "are typically bundled into portfolios" to be sold. FTC 2013 Report at 17.

2. Mass consumer debt buyers like Midland and Resurgent price bundles of consumer debt based in part on their age and timeliness. *See* FTC 2013 Report at 21.[13] As a debt ages, its value drops precipitously: Whereas a debt less than 3 years old generally costs 7.9 cents per dollar of debt, a 3 to 6 year-old debt costs only 3.1 cents and a 6 to 15 year old debt 2.2 cents; debts older than 15 years cost "effectively nothing." *Id.* at 23-24.[14] As their

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[11] These nine firms include Sherman Financial Group, LLC, which owns Resurgent Capital Services, L.P., ("Resurgent") a defendant in this case before the Eleventh Circuit and an *amicus curiae* before this Court, and LVNV Funding, LLC, a defendant in the Seventh Circuit decision presenting the identical issues raised here. See *Owens* v. *LVNV Funding, LLC*, 832 F.3d 726 (7th Cir. 2016).

[12] Federal regulations require banks to "charge off" credit-card debts after a certain amount of time. See FTC 2013 Report at 13 & n.58.

[13] Debt buyers examine a variety of factors including "the average balance per debt in the portfolio, the average number of months since the creditor charged off the debt, the average number of months since the debtor made the last payment, the states in which the debtors reside, the distribution of balances on the debts, the prevalence of time-barred debts, and the type of accounts being sold." FTC 2013 Report at 21.

[14] "Debt buyers presumably pay less for older debts because their expected return from collecting on those debts is lower, likely reflecting the fact that the consumers may be less willing or able to

pennies-on-the-dollar prices reflect, these debts are extremely difficult to collect.[15]

The ability to accurately price these debts based on age and timeliness is critical to a debt buyer's success.[16] For example, Encore touts its "information advantage" and proprietary valuation models as two keys to its competitive advantage. Encore 10-K 3. To that end, Encore claims to "obtain detailed information regarding the portfolio's accounts," and it "continually monitor[s] applicable changes to laws governing statutes of limitations." *Id.* at 5, 7. Encore is not unique—the FTC concluded "that debt buyers usually are likely to know or be able to determine whether the debts on which they are collecting are beyond the statute of limitations." FTC 2013 Report at 49; see also *id.* at 49 & n.204.

3. Over the years, mass consumer debt buyers like Midland and Resurgent have used a variety of aggressive tactics, including to recover debt that *they know* is time-barred.[17] Courts and regulators have thwarted these different efforts time and again.

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pay the debt or the consumers may be more difficult for debt buyers to locate." *Id.* at 24. Moreover, "[m]ost states' statutes of limitations are between three and six years, and no state's statute of limitations is longer than fifteen years." *Id.* at 42.

[15] Encore, for example, "generate[s] payments from less than one percent of our accounts every month." *Id.* at 2.

[16] The low barriers to entry in the industry pressure even the big nine firms to adapt. See, *e.g.*, Encore Capital Group, Inc., 2016 Form 10-K 16 ["Encore 10-K"].

[17] In fact, the rise of the debt-buying industry has corresponded with "a significant rise in" consumer complaints about collection practices. FTC 2013 Report at 1. In 2013 alone, for example, the FTC received over 200,000 such complaints. Stifler & Parish at 2.

For example, debt buyers have increasingly used litigation as a debt collection strategy in recent years. See, *e.g.*, Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, Wall Street Journal (Nov. 28, 2010) ("The big explosions in lawsuit is coming not from lenders but from firms who buy debt.").[18] Encore filed 245,000 suits in one year, and petitioner alone filed 110 lawsuits on one day in a single state court (Bronx County Civil Court). *Boom in Debt Buying*, *supra*; see also Fox, *supra*, at 373-374 (petitioner filed 1,875 lawsuits in 3 months in Indiana).

Debt buyers generally "rely on overburdened 'small claims courts,' where the state court formal rules of evidence typically do not apply." Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. Bus. & Tech. L. 259, 261 (2011) ("Debt buyers shy away from large-value cases, which would require formal proof that complies with the forum state's rules of evidence.").[19] They often prevail on even meritless claims because debtors default. FTC 2013 Report 45 ("90% or

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[18] See also Stifler & Parish at 9; see, *e.g.*, FTC 2009 Report at 55 ("The vast number of debt collection suits filed in recent years has posed considerable challenges to the smooth and efficient operation of courts."); CFPB Order at 13 ("Encore has filed hundreds of thousands of lawsuits to collect Consumer Debt.").

[19] See also, *e.g.*, Nat'l Consumer Law Ctr., Comment to the Federal Trade Commission Regarding the Fair Debt Collection Practices Act 3 (Aug. 1, 2009) (explaining that small-claims courts are especially attractive "because of their relaxed procedural formalities, low evidentiary standards, inexpensive filing fees, and negligible pleading requirements"). Sometimes, however, courts' local rules incentivize buyers to sue instead in general-jurisdiction courts. See Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 Loy. Consumer L. Rev. 355 (2012).

more of consumers sued in these actions do not appear in court to defend"); Holland, *supra*, at 263 (debt buyers have won "billions of dollars in default judgments").[20]

But courts have imposed considerable obstacles to using litigation to collect debt. Lower courts have consistently held that filing suit to collect on a knowingly time-barred debt violates the FDCPA. See, *e.g.*, *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, (11th Cir. 2014) ("Federal circuit and district courts have uniformly held that a debt collector's threatening to sue on a time-barred debt and/or filing a time-barred suit in state court to recover that debt violates §§ 1692e and 1692f.").[21]

Regulators have also intervened. For example, the Consumer Financial Protection Bureau (CFPB) found that "Encore sent thousands of letters containing time-limited 'settlement' offers that failed to disclose that the Debt it was collecting was too old for litigation and that implied a legally enforceable obligation to pay the Debt." Consent Order at 18, *In re Encore Capital Group, Inc.*, No. 2015-CFPB-0022 (Sept. 9, 2015) (CFPB Order).[22]

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[20] Despite the lack of documentation supporting the debt, buyers have been able to take advantage "of lax—and often unenforced—procedural rules." Holland, *supra*, at 262-263.

[21] Some courts have also imposed filing restraints—one Indianapolis judge limited a law firm used by Encore to filing 500 new debt-collection cases every two weeks. *Boom in Debt Buying*, *supra*.

[22] In 2015 Petitioner and its other Encore affiliates stipulated to a consent order from the CFPB to settle accusations of unfair and predatory debt collection practices. Each month, petitioner and its affiliates received approximately 30,000 written disputes, 10,000 oral disputes, and 100,000 electronic disputes from consumers regarding their collection practices. *Id.* at 10. Based on a host of violations of the FDCPA and other consumer-protection laws—including attempting to collect on time-barred debt—the CFPB ordered restitution of at least $34 million. *Id.* at 45-47. The CFPB also ordered peti-

And another Encore entity made thousands of harassing and abusive phone calls to attempt debt collection. *Ibid.* The CFPB concluded that petitioner and its affiliates violated the FDCPA by "represent[ing], directly or indirectly, expressly or by implication, that [c]onsumers had a legally enforceable obligation to pay" time-barred debt. *Id.* at 28.[23]

4. With some avenues cut off, bankruptcy is the new frontier for mass consumer debt buyers like Midland and Resurgent seeking to knowingly collect time-barred debt.[24] Indeed, courts have noted the flood of knowingly time-barred claims.[25]

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tioner and its affiliates to cease "[c]ollecting or attempting to collect any [t]ime-[b]arred [d]ebt through any means, including but not limited to telephone calls and written communications, without clearly and prominently disclosing to the [c]onsumer" that the debt was time-barred and could not be enforced. *Id.* at 38-39.

[23] The CFPB also found that, "[i]n numerous instances, Encore has threatened and filed suit on Debt that was past the applicable statutes of limitations." CFPB Order at 17.

[24] In 2015, Encore filed nearly $314 million worth of claims, at an average claim value of $3,391.30, although it is unclear what proportion pertained to time-barred debt. See Am. InfoSource, *AIS Insight 2015 Year in Review* 14.

[25] See, *e.g.*, *Crawford*, 758 F.3d at 1256 ("A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers—armed with hundreds of delinquent accounts purchased from creditors—are filing proofs of claim on debts deemed unenforceable under state statutes of limitations."); *In re Jenkins*, 456 B.R. 236, 239 n.2 (Bankr. E.D.N.C. 2011) (describing "[t]he plague of stale claims emanating from debt buyers"); *In re Andrews*, 394 B.R. 384, 387 (Bankr. E.D.N.C. 2008) ("The phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system.").

Recently, the United States Trustee sued Resurgent for "knowingly and strategically fil[ing] thousands of" claims "for debt that is time-barred and subject to disallowance upon objection as a matter of law pursuant to 11 U.S.C. § 502(b)(1)." Compl. ¶ 35, *In re Freeman-Clay* v. *Resurgent Capital Servs., L.P.*, No. 14-41871-DRD13 (Bankr. W.D. Mo. Aug. 22, 2016).

The U.S. Trustee alleged that Resurgent deliberately refrained from bringing suit on these claims outside bankruptcy because it knew they were stale. See *id.* ¶ 40 ("the only way Resurgent attempts to monetize this stale debt using any legal process is by asserting these otherwise legally unenforceable claims in bankruptcy cases throughout the country"). And like Resurgent, petitioner promises to "not pursue collections through legal means" on any account "past its applicable statute of limitations." Encore 10-K at 7.

C. Procedural History

Petitioner purchased $1,879.71 of consumer debt incurred by respondent. See J.A. 18, 25. The last transaction on the consumer credit account was in May 2003, and the debt was charged off as of January 2004. J.A. 18. Alabama's six-year statute of limitations for the collection of that debt thus lapsed in May of 2009. See Ala. Code § 6-2- 34. In fact, virtually every state's statute of limitations would have expired by this time. See FTC 2013 Report at 42 & nn.175-176.

In 2014, five years after the statute of limitations lapsed and over a decade after the last transaction on the account, respondent filed for personal bankruptcy under Chapter 13 of the Bankruptcy Code. J.A. 25. Even though the statute of limitations for the collection of the debt had long since expired, petitioner filed a claim in the bankruptcy proceeding for the debt it had purchased. See J.A. 12-19. Respondent objected to the claim on the

ground it lacked proper documentation. J.A. 21. Petitioner did not attempt to remedy that defect, and the bankruptcy court disallowed the claim. The court then approved a repayment plan for the allowed claims.[26]

1. Respondent's counsel immediately filed a class action against Midland under the FDCPA, hoping to end a scheme that injures vulnerable debtors with increasing frequency. What Midland derides as a "form complaint" filed "three days after the bankruptcy court disallowed petitioner's claim," Pet. Br. 8, was—in fact—a measured challenge to petitioner's notorious and illegal business model (in direct response to the paradigmatic, frivolous proof of claim filed in respondent's bankruptcy).

In this lawsuit, Respondent alleges that petitioner's attempt to collect a knowingly time-barred debt was "un-

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[26] Petitioner complains that "the record does not reflect whether there was some reason the limitations defense would not apply." Br. 8 n.1. That is grossly misleading. As petitioner is undoubtedly aware, the record also does not reflect that petitioner made any effort whatsoever to show that the claim was meritorious, such as amending the claim or supplying documentation supporting the claim's legitimacy. See, *e.g.*, *In re Taylor*, 363 B.R. 303, 310 (Bankr. M.D. Fla. 2007) ("Certainly, if a creditor fails to initially attach sufficient documentation, the creditor should be given an opportunity to supplement the initial claim to add the additional supporting documentation. *See In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (11th Cir.1985) ('[I]n a bankruptcy case, amendment to a claim is freely allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim.')"). What's more, "the majority view [is] that a proof of claim may not be disallowed where the sole basis of objection is the creditor's failure to attach sufficient documentation." *In re Brunson*, 486 B.R. 759, 773 (Bankr. N.D. Tex. 2013). To be clear: instead of pursuing its claim or contesting the objection, petitioner gave up. The explanation for this surrender is obvious: the claim was frivolous.

fair," "unconscionable," "deceptive," and "misleading" in violation of 15 U.S.C. 1692e and 1692f. The district court rejected petitioner's argument that respondent failed to state a claim under the FDCPA. Pet. App. 19a-20a. The court nonetheless granted petitioner's motion to dismiss on the ground that the Bankruptcy Code precluded the FDCPA suit because the Code granted petitioner a "right" to file the time-barred claim. Pet. App. 20a-37a.

2. The court of appeals reversed. Pet. App. 1a-15a. The court first reaffirmed its prior holding from *Crawford* that "a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred." Pet. App. 2a, 5a. *Crawford* had explained that the reasons for "outlaw[ing] 'stale suits to collect consumer debts'" apply equally "in the bankruptcy context." 758 F.3d at 1259-1260. As in ordinary litigation, time-barred claims take unfair advantage of debtors, deliberately "creat[ing] the misleading impression" that stale debts can be enforced. *Id.* at 1261. And bankruptcy debtors will often give up rather than fight a frivolous claim: "filing objections to time-barred claims consumes energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court." *Ibid.* As the court reasoned, "the limitations period provides a bright line for debt collectors and consumer debtors, signifying a time when the debtor's right to be free of stale claims comes to prevail over a creditor's right to legally enforce the debt." *Id.* at 1260-1261. Accordingly, *Crawford* concluded, "[j]ust as LVNV would have violated the FDCPA by filing a lawsuit on

stale claims in state court, LVNV violated the FDCPA by filing a stale claim in bankruptcy court." *Id.* at 1262.[27]

The court below then addressed the question that *Crawford* held open: whether the Bankruptcy Code "preclude[s] an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred." Pet. App. 7a. The court held that the Code "does not preclude an FDCPA claim in the bankruptcy context." Pet. App. 15a. Although it agreed with the district court that the Code does not itself prohibit the knowing filing of a time-barred claim, the court explained that the Act, which applies only to "debt collectors," "addresses the later ramifications of filing [such] a claim." *Id.* at 12a. By filing a time-barred claim, which the court recognized was an "unfair" and "deceptive" debt collection practice under the Act, a debt collector "is simply opening [itself] up to a potential lawsuit for an FDCPA violation." *Id.* at 14a (internal quotation marks omitted). Because the Act prohibits certain predatory conduct by debt collectors even if that conduct is not separately prohibited by the Code, the court explained that "the Code does not . . . protect those creditors from all liability." *Id.* at 2a. Accordingly, the court held, the two statutory schemes can be "reconciled." *Id.* at 12a.

3. The court of appeals denied rehearing en banc without a vote. Pet. App. 16a-17a.

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[27] Other courts have since held that this conduct does not violate the FDCPA, two of them over vigorous dissents. See *Owens* v. LVNV Funding, LLC (7th Cir. 2016) (Wood, C.J., dissenting); *In re Dubois*, 834 F.3d 522 (4th Cir. 2016) (Diaz, J., dissenting).

SUMMARY OF ARGUMENT

Contrary to Midland's contention, the FDCPA prohibits filing proofs of claim on knowingly time-barred debt.

I. Midland's clear abuse of the bankruptcy process violates the FDCPA. Midland represents that its time-barred claims are valid and enforceable when it knows the opposite is true. This deceives debtors and creates obvious risks of illegitimate claims slipping through the process unnoticed.

Midland also exploits the claims-allowance process to collect when the system *malfunctions*. Midland engages in a systemic effort to "flood" bankruptcy proceedings with thousands of time-barred claims. Midland files these claims without any legitimate basis or useful purpose. There is *no* scenario in which these claims survive under proper review: Midland's claims are invalid and will be universally rejected if the process functions as Congress intended. Midland's entire scheme is premised on the hope that the system will break down and fail—as it predictably does when debtors fail to object and trustees fail to weed out invalid claims. This flagrant abuse imposes needless costs on courts and innocent parties; it is exactly the kind of false, deceptive, and unfair practice that the FDCPA was designed to avoid.

As the Eleventh Circuit held in *Crawford*, the same acts that violate the FDCPA outside bankruptcy also violate the FDCPA within it. Courts routinely hold that debt collectors violate the FDCPA by filing state-court litigation over time-barred debts. See, *e.g.*, *Phillips* v. *Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). The same rationale applies in this context: there is no reason that debt collectors suddenly have more freedom to pursue stale claims once debtors enter bankruptcy. Ironically, had Johnson not declared bankruptcy,

Midland indisputably would have no right to demand payment from anyone. Bankruptcy promises a fresh start by forgiving debt. Midland's attempt to use bankruptcy to *add* debt flips the system on its head.

II. Midland says that its behavior is justified by the Code, but Midland is incorrect. The Code, unremarkably, does not tolerate claims that should always lose unless something goes wrong. Midland has no good-faith basis for pursing indisputably time-barred claims, and its contrary position is at odds with the Code's text, structure, and purpose. There is no "right" to file knowingly time-barred claims.

III. Midland is also incorrect that the Bankruptcy Code repealed the FDCPA *by implication*. Such repeals must be established through "clear text" or "irreconcilable conflict" (*J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)), and Midland fails that heavy burden.

A. Midland concede that there is no *textual* preclusion. Put simply, nothing in the Code or the FDCPA possibly qualifies as a "clear statement" that one scheme precludes the other.

B. 1. Nor is there any irreconcilable conflict. As explained above, the FDCPA prohibits what the Code does not even allow, and its application would not undermine the Code, but *promote* it. Because nothing compels (or even permits) an act under one scheme that violates the other, there is no conceivable "conflict."

2. The FDCPA survives the Code even if parties had a "right" to file knowingly baseless claims. There is no conflict where a party can easily comply with each scheme by voluntarily refraining from targeted behavior. The Code creates a *permissive* right to file a claim; no one is compelled to take any act under the Code that is

forbidden by the FDCPA. The fact that professional debt collectors are singled out for additional regulation does not create a conflict; it merely reflects Congress's considered judgment that this particular group imposes heightened risks of public harm, and its behavior must be restricted in ways that do not affect ordinary creditors.

Congress intended the FDCPA to fill the gaps of other laws, and it does that here. Professional debt collectors are purchasing huge portfolios of knowingly stale claims, and flooding bankruptcy courts with claims that are undeniably unenforceable. While individual claims may impose little harm, the aggregate effect of this practice is staggering. Congress had every reason to impose additional restrictions on groups that tend to abuse the system to collect debts. It was aware that existing remedies were not always adequate to deter wrongful collection practices, and it intended the FDCPA to overlap with those schemes to provide added protection. The remedies available under the Code for *ordinary* creditors are not calibrated to handle the business methods of debt collectors. The FDCPA performs that role, and Midland errs in refusing to accept this superimposed scheme as Congress intended. The judgment should be affirmed.

ARGUMENT

I. THE FDCPA PROHIBITS KNOWINGLY FILING A PROOF OF CLAIM ON TIME-BARRED DEBT IN A CHAPTER 13 BANKRUPTCY

As the court of appeals correctly held, filing a knowingly time-barred proof of claim violates the FDCPA. 758 F.3d at 1256-1257. That is exactly what Midland has done here: it filed a proof of claim without any good-faith belief that it was an enforceable obligation. On its face,

the debt involved a transaction from over *twelve years* ago (May 28, 2003); the original creditor charged off the debt on January 5, 2004, still over a *decade* ago. Dkt. 1-1 at 3. The limitations period is only six years (at most), meaning the last chance to sue expired in May 2009. Dkt. 21 at 1 & n.1.

Midland submitted this proof of claim without any plausible legal theory that it should be paid out of estate funds. Midland's only hope was that the debtor may unwittingly "fail to object" and the trustee may "fail[] to fulfill its statutory duty to object to improper claims." *Crawford*, 758 F.3d at 1259 n. 5, 1261. The Code's automatic-allowance provision (11 U.S.C. 502(a)) would then force Johnson to "pay the debt from h[er] future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court." *Id.* at 1259. This renders Midland's actions "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f." *Id.* at 1260.

A. Midland Violates The FDCPA By Falsely Representing That Its Time-Barred Claims Are Valid And Enforceable When It Knows Exactly The Opposite Is True

The FDCPA "specifically prohibits the false representation of the character or legal status of any debt" (*McMahon*, 744 F.3d at 1020), which precisely describes Midland's conduct. Its claims are indisputably time-barred and unenforceable. Yet "[i]n the context of the Bankruptcy Code's automatic claims allowance process, the filing of a proof of claim amounts to an assertion that the underlying claim is enforceable and that the claimant is entitled to be paid out of the bankruptcy estate." *Feggins* v. *LVNV Funding LLC (In re Feggins)*, No. 13-11319-WRS, 2015 Bankr. LEXIS 2822, at *15-*16 (Bankr. M.D. Ala. Aug. 24, 2015).

Midland has abused this process and taken unfair advantage of default rules declaring its claims "prima facie" valid when it knows the opposite is true. Its conduct is misleading because some debtors will understandably assume that Midland's claims are indeed "valid" despite their patent unenforceability. And its conduct is deceptive because it includes these invalid claims in a busy process designed for legitimate claims—where it is hardly surprising that invalid claims get lost in the shuffle. This conduct squarely violates the FDCPA, and Midland's contrary contention is meritless.

1. Defendants misrepresent the "character" and "legal status" of time-barred debts. 15 U.S.C. 1692e, 1692e(2)(A), 1692e(10).

"Whether a debt is legally enforceable is a central fact about the character and legal status of that debt." *McMahon*, 744 F.3d at 1020. Under the Code's background rules, however, *all* claims are automatically deemed "prima facie" valid. *Gardner* v. *New Jersey*, 329 U.S. 565, 573 (1947); see also Fed. R. Bankr. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim."); 11 U.S.C. 502(a).

Midland exploits these rules. It is aware that its claims are not properly entitled to a presumption of validity—indeed, quite the opposite. Yet Midland never discloses that its claims are "prima facie" *invalid* or makes any corrective statement to avoid deceiving the court or other parties. Cf. *McMahon*, 744 F.3d at 1021 ("Neither LVNV nor CMS gave a hint that the debts that they were trying to collect were vulnerable to an ironclad limitations defense."). Midland simply leverages "the misleading impression * * * that the debt collector can legally enforce [a] debt" that indisputably cannot be

enforced. *Crawford*, 758 F.3d at 1261; see also *Buchanan*, 776 F.3d at 396.

Midland seeks to excuse itself by saying the Rules did not *require* it to make any disclosures. Br. 28. But Midland is aware of the Code's default presumption, and it is aware of the obvious impression left by filing a proof of claim. By choosing to participate in the process, Midland is necessarily representing that its claims are enforceable. That deception violates the FDCPA: "[A] time-barred claim is unenforceable within the meaning of the Bankruptcy Code, so a debt collector who knowingly files such a claim in bankruptcy is falsely asserting that it is entitled to be paid." *Feggins*, 2015 Bankr. LEXIS 2822, at *16.

Midland also contends that its claims were literally true: it "accurately" recounted all the required information on a court-approved form and "made the required disclosures * * * correctly and completely." Br. 27-28. Perhaps so.[28] But "the statute outlaws more than just falsehoods"; "even a true statement may be banned for creating a misleading impression." *Buchanan*, 776 F.3d at 396 (Sutton, J.); see also *Gammon* v. *GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1258 (7th Cir. 1994) (Easterbrook, J., concurring) ("literal truth may convey a misleading impression").

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[28] Or perhaps not: Midland may have accurately stated the relevant facts of the transaction, but the filing itself is a bottom-line declaration that the claim is presumptively "valid" and entitled to be paid—which is the automatic result if no one objects. 11 U.S.C. 502(a). The unavoidable representation is that Midland was entitled to relief, which it knew was false. See *Robinson* v. *eCast Settlement Corp.*, No. 14-CV-8277, 2015 WL 494626, at *3 (N.D. Ill. Feb. 3, 2015) (a proof of claim bears "an implicit representation of legal enforceability").

Even were Midland's filings literally true, they still used deceptive *means* to foster the misleading impression that time-barred debts were enforceable. A professional debt collector cannot excuse itself by including half-truths about a debt's amount or age—Midland still wrongly included stale debts in a process reserved for *enforceable* claims.

Finally, Midland makes much of the fact that the Advisory Committee declined to require an affirmative statement regarding timeliness when it last amended Rule 3001(c). Br. 20-21, 28. But Midland again only tells half the story: The working group was concerned about *good-faith* claims where creditors were genuinely unsure about the timeliness of a claim; they were not giving a pass to creditors who knowingly file invalid claims. See *Agenda Book for the Meeting of the Advisory Committee on Bankruptcy Rules* 86-87, 90 (Mar. 26-27, 2009) <tinyurl.com/2009agenda> ("some members of the subcommittee believed that there are too many factors involved with a statute of limitations defense for a claimant to be able to affirmatively certify that it is inapplicable"). Indeed, the working group expressly recognized that Rule 9011 "imposes an obligation on a claimant" to undertake a reasonable pre-filing inquiry and determine that "a claim is warranted by existing law and that factual contentions have evidentiary support." *Id.* at 87. And the Advisory Committee again confirmed that claims complying with Rule 3001(c) "constitute[] prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001 advisory committee's notes (2012).

The resulting message is inescapable: The committee did not expect claimants to conduct a good-faith inquiry under Rule 9011 only to *ignore* the result and file baseless claims anyway—and they assuredly did not provide any reason to think that claims *found to be invalid*

should be deemed "prima facie" valid and enforceable. The rule amendments only confirm Midland's misconduct: it shows that Midland has no basis for filing defective claims in a process reserved for enforceable obligations, and it violates Rule 9011 by determining the untimeliness of its claims and then filing anyway. Its abusive scheme fits comfortably within the FDCPA, and nothing in the Code washes away its misrepresentations.[29]

2. Midland's conduct is also deceptive. Apart from the potential to mislead or confuse debtors who actually read the proof of claim, it also has the potential to slip through the process unnoticed. The very act of cloaking the claim with presumptions of "validity" reduces the odds that others engage in a studied review, spot the known defect, and object:

> The typical federal court disposes of hundreds of cases each year—a bankruptcy court disposes of thousands. It is not uncommon to see dozens of attorneys in a bankruptcy courtroom, presenting arguments and objections on a long list of cases, with rulings issuing at pace that makes a cattle auction appear lei-

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[29] Contrary to Midland's contention (Br. 27-29), *Sheriff* v. *Gillie*, 136 S. Ct. 1594 (2016), does not help its position. In *Sheriff*, the Court held that special counsel's use of agency letterhead did not "falsely" imply an affiliation with the Attorney General—because special counsel *was in fact affiliated with the Attorney General*. 136 S. Ct. at 1601-1602. The challenged "impression" was not false or misleading because the impression was *true*. *Id.* at 1602-1603. Here, however, the same *cannot* be said of Midland's proofs of claim. It makes no difference that those claims disclosed half-truths about the debts, because Johnson is not challenging those half-truths; again, she is challenging the core assertion that Midland's claims are valid and enforceable—facts Midland knew were false before it deliberately fostered the opposite impression with its claims.

> surely. A bankruptcy court does not have the time district courts devote to a motion, to examine each petition, proof of claim, and objection; the bankruptcy judge must rely on counsel to act in good faith. The potential for mischief to be caused by an attorney who is willing to skirt ethical obligations and procedural rules is enormous.

Young v. *Young (In re Young)*, 789 F.3d 872, 879 (8th Cir. 2015) (internal quotation marks omitted).

Midland takes advantage of this process to create the impression that its claims are valid and enforceable, thus misstating the "character" and "legal status" of the debt. 15 U.S.C. 1692e, 1692e(2)(A), 1692e(10). This again violates the FDCPA.

3. Midland argues that its conduct would not have misled or deceived a "competent attorney," and its conduct should be measured against that heightened standard. Br. 29-30 (opposing use of the "unsophisticated consumer" alternative); compare, *e.g.*, *Wallace* v. *Wash. Mut. Bank, F.A.*, 683 F.3d 323, 326 (6th Cir. 2012) (asking whether a "statement would tend to mislead or confuse the reasonable unsophisticated consumer"). Midland is incorrect.

Midland's representations are designed to deceive unrepresented debtors or mislead busy attorneys and trustees who have neither the time nor the resources to review invalid proofs of claim. Because the process often relies on consumer debtors as the ultimate backstop, Midland's representations should be reviewed on the assumption that the debtor herself (*not* her attorney) will review these claims. See *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007) (the FDCPA standard is "different when the conduct is aimed at a lawyer than when it is aimed at a consumer").

Indeed, Midland's communications are not directly aimed at lawyers. These are court filings in a busy process that *may or may not* be reviewed by attorneys. This fact is an essential component of Midland's scheme: If these communications *always* reached competent professionals (with time to review them), Midland's claims would be rejected 100% of the time, and Midland would stop misusing the claims-process.[30] Midland's business model critically relies on claims slipping through the process without any educated review. Given that Midland only collects when lawyers and trustees do *nothing*, it is a bit much for Midland to insist that those groups always review these claims.[31]

Nor is it relevant that Johnson herself was represented by an attorney. Contra Br. 30. This overlooks the FDCPA's private-attorney-general function. See, *e.g.*, *Tolentino* v. *Friedman*, 46 F.3d 645, 651-652 (7th Cir. 1995). The FDCPA is designed to avoid and deter abu-

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[30] The only exception: There are instances where competent professionals do review Midland's meritless claims but simply acquiesce to avoid the cost of an objection. Those claims may not mislead or deceive anyone, but that hardly excuses Midland's misconduct: it is highly abusive to file frivolous claims knowing that the nuisance value will result in an illegitimate payout. Even if Midland somehow escapes liability under Section 1692e (due to the sheer obviousness of the defects in its filings), its misuse of the claims-process is still grossly unfair and unconscionable under Section 1692f.

[31] This accordingly is unlike a situation where a debt collector sends direct communications exclusively to attorneys. Midland's court filings can be viewed by anyone, including unrepresented debtors (as is sometimes the case). Had Midland somehow restricted its filings to a debtor's lawyer, it would at least have some basis for assessing liability under a heightened standard. But these filings were not *directed* at counsel; they were submitted to the court, in the hope that no one (most of all any competent lawyer) would ever review them.

sive practices. Plaintiffs who are *not* deceived are permitted (and encouraged) to file suit in order to protect consumers who would otherwise fall victim to debt-collector misconduct. See *Crawford*, 758 F.3d at 1258 ("[t]he inquiry is not whether the *particular* plaintiff-consumer was deceived or misled") (emphasis added). It is accordingly irrelevant that Johnson was represented. That is not always the case for many consumers, which is precisely why Midland continues exploiting the system. The FDCPA deters Midland from wasting everyone's time and serves as a safeguard for those consumers who cannot otherwise protect themselves.

B. Midland Violates The FDCPA By Exploiting The Claims-Allowance Process To Collect When The System *Malfunctions*, Not When It Operates As Congress Intended

Midland also violates the FDCPA by using "unfair or unconscionable means to collect or attempt to collect" time-barred debts. 15 U.S.C. 1692f. Midland succeeds only when the bankruptcy process breaks down and fails—as it routinely does. Its claims have no legitimate purpose: there are *zero* circumstances where Congress intended time-barred claims to divert funds from the estate. Midland simply exploits unintended flaws in the process, at the expense of vulnerable debtors and innocent creditors. Its scheme is "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f." *Crawford*, 758 F.3d at 1260.

1. Midland engages in a flagrant misuse of the bankruptcy process. As described above, proofs of claim are automatically "allowed" unless someone objects. 11 U.S.C. 502(a). Under this automatic-allowance procedure, all unchallenged claims—even patently *invalid* claims—are included by default in distributions. This permits the system to function efficiently. But it also

creates opportunities for abuse: creditors with defective claims can "unfairly game[] the system by taking advantage of the automatic claims allowance process," "camouflaging [their claims] among the inundation of other claims filed," and hoping to "slip past the bankruptcy court's supervision unnoticed." *Feggins*, 2015 Bankr. LEXIS 2822, at *16. These bad-faith actors know that if the process breaks down, they will illegitimately collect on unenforceable claims, flouting Congress's intent.

Most legitimate debt-collection efforts work within the system's intended operation; Midland's business model, by contrast, is predicated entirely on system failure.[8] Midland knowingly floods bankruptcy courts with time-barred claims in the hope of collecting unenforceable debts. These claims have no legal justification. *Avalos*, 531 B.R. at 757. Midland does not (and *cannot*) contend that it has any good-faith basis for these filings. Midland's only hope is that the system *malfunctions*: the debtor may unwittingly "fail to object" and the trustee may "fail[] to fulfill its statutory duty to object to improper claims." *Crawford*, 758 F.3d at 1259 n.5, 1261. When that happens, Midland can force debtors to "pay the debt from [their] future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court." *Id.* at 1259.

This scheme is "an abuse of the claims allowance process and an affront to the integrity of the bankruptcy

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[8] System failure is also all too predictable. Consumer debtors may review claims without an attorney, and many unrepresented debtors are unaware of limitations defenses. While trustees are likely aware of limitations defenses, they may not devote their limited time and resources to inspecting claims. Midland, by design, takes improper advantage of these predictable deficiencies.

court." *Feggins*, 2015 Bankr. LEXIS 2822, at *12. Midland imposes pointless costs on courts and innocent parties without any offsetting societal value or public benefit. In the best-case scenario, the debtor or trustee is burdened with the hassle and expense of filing needless objections, and the court is forced to waste its time and resources rejecting baseless claims; in the worst-case scenario, the process breaks down and allows invalid claims, diverting limited funds from vulnerable debtors and honest creditors. The process is sufficiently taxed without the deliberate filing of baseless claims. Midland's attempt to profit from system-error is unfair and unconscionable, and it violates the FDCPA.

2. Midland insists that its scheme is a fair and legitimate use of the bankruptcy process, but it is mistaken.

According to Midland, Congress *invited* parties to file knowingly time-barred claims. Br. 31. Yet as explained more below (Part II, *infra*), Congress did not invite or tolerate the filing of frivolous claims.

In practice, Midland effectively concedes that its knowingly time-barred claims are "baseless" or "frivolous." It is difficult to imagine a better characterization for a claim that is indefensible in court: once anyone lodges an objection, Midland immediately throws in the towel. It simply withdraws or abandons the stale claim, because it has no colorable basis for defending why it previously asserted a "right to payment." When a party asserts that it has a "valid" claim—when it knows it has an *invalid* claim—it has filed (in common parlance) a *frivolous* claim. See, *e.g.*, *Feggins*, 2015 Bankr. LEXIS 2822, at *15-*16.

Nor is Midland's practice somehow "fair" because its claims clearly state information that can be used to determine if the debt is time barred. Br. 32. This same information is available to *Midland*, who thus knew its

claims were time-barred but filed anyway. It is hardly an excuse that others—absent system failure—might figure out what Midland already knew before "burden[ing]" the system with frivolous claims. *In re Sekema*, 523 B.R. 651, 655 (Bankr. N.D. Ind. 2015) (sanctioning debt collectors with a fine "reflect[ing] an appreciation of the system-wide burdens created by this type of misconduct").

Moreover, Midland cannot offer a single legitimate reason that its participation actually benefits anyone—other than itself. It does not benefit the debtor, who is already protected from enforcement (time-barred debts are only "moral" obligations, not legal ones). See also Part II, *infra*. It does not benefit the trustee, who already has enough on her plate without wasting time and resources objecting to frivolous claims. It does not benefit legitimate creditors, whose proper share is diminished when the system wrongly permits recovery on time-barred debts. If the system operates without error, those debts will be categorically excluded. There is no universe in which the process is frustrated when debt collectors refrain from filing frivolous claims.

C. The Same Baseless Filings That Would Violate The FDCPA In State Court Also Violate The FDCPA In Bankruptcy

As even Midland effectively admits, it could not file time-barred claims in state court without violating the FDCPA. *Phillips*, 736 F.3d at 1079 (invoking 15 U.S.C. 1692e, 1692f); see also *Freyermuth* v. *Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). Midland, however, insists that it can sidestep the FDCPA by pursuing the same stale debt in bankruptcy, because bankruptcy is "different" and Chapter 13's "safeguards" protect debtors. Br. 34-38. Midland is wrong.

1. As the Eleventh Circuit held in *Crawford*, in every relevant respect, the reasons "for outlawing stale suits to

collect consumer debts" (*Phillips*, 736 F.3d at 1079) are "[t]he same * * * in the bankruptcy context." *Crawford*, 758 F.3d at 1260. Here, as in ordinary litigation, knowingly time-barred claims take unfair advantage of debtors, deliberately "creat[ing] the misleading impression" that debts can be enforced. *Id.* at 1261. Indeed, the entire point of Midland's scheme is to deceive debtors into "unwittingly" accepting stale debt. *Phillips*, 736 F.3d at 1079. Likewise, debtors will often give up rather than fight a frivolous claim: "filing objections to time-barred claims consumes energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court." *Crawford*, 758 F.3d at 1261. Here, as in state court, frivolous claims may survive simply because no one has sufficient incentive to oppose them.

"In bankruptcy," as in ordinary litigation, "the limitations period provides a bright line for debt collectors and consumer debtors, signifying a time when the debtor's right to be free of stale claims comes to prevail over a creditor's right to legally enforce the debt." *Crawford*, 758 F.3d at 1260-1261. The FDCPA "outlaw[s]" time-barred claims in state court (*Phillips*, 736 F.3d at 1079); there is no reason that Congress intended to provide *less* protection once debtors enter bankruptcy. See, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 55 (1979).

2. Midland, however, argues that Chapter 13 debtors are protected by attorneys and trustees. Midland insists that these safeguards operate effectively, but it has no answer for this simple question: If bankruptcy's safeguards always functioned, why are Midland's time-barred claims ever allowed? Midland failed to cite a *single* reason that its claims would ever survive a proper objection. So why does Midland recover with sufficient frequency to make this a viable business model?

The answer is obvious: Bankruptcy's "safeguards" are *not* adequate. Midland is well aware of the deficiencies in the process, because its entire practice turns on exploiting those deficiencies. If the process functioned as Congress intended, its claims would be rejected 100% of the time, and it would stop "flooding" the courts with frivolous claims.

Indeed, while Chapter 13 debtors are often represented by lawyers, not all consumer debtors have lawyers, and not all lawyers are retained to review claims or file objections. It is wrong to presume that attorneys retained for the overall bankruptcy have also been paid to review proofs of claim. And every time debtors are unrepresented (or a representation's scope is limited), debtors alone are forced to review claims and identify defenses. Those debtors are materially indistinguishable from debtors in state-court litigation.

Nor is it fair to ask debtors to hire attorneys to object to Midland's time-barred filings. See *Birtchman*, 2015 WL 1825970, at *9 (suggesting debtors would incur only "minimal" expense for "the additional legal work required" to challenge time-barred claims). The cost of even a few hundred dollars is a meaningful expense to Chapter 13 debtors—it can mean the difference in a debtor's ability to meet basic needs for herself and her family. And even if frivolous claims prompt only "straightforward" objections (*ibid.*; Pet. Br. 32), someone must still review the claim, confirm the limitations period, prepare the objection, and file that objection with the court, which must then review and adjudicate the issue. Even if that entire process consumes only an hour of everyone's time—an exceedingly low estimate—the aggregate cost of filing hundreds of thousands of claims quickly reaches staggering proportions. See, *e.g.*, *Jenkins* v. *Genesis Fin. Solutions, LLC (In re Jenkins)*, 456

B.R. 236, 241 (Bankr. E.D.N.C. 2011) ("The issue is a real one, the problem is widespread, and it burdens both debtors and the courts."). Given the lack of any redeeming value in Midland's practice, this significant expense is hardly warranted.[33]

Midland further insists that debtors are adequately protected by trustees: even with "unrepresented" debtors, trustees have an independent statutory obligation to object to improper claims, including those barred by the statute of limitations. Br. 31; see also *LaGrone* v. *LVNV Funding LLC (In re LaGrone)*, 525 B.R. 419, 426 (Bankr. N.D. Ill. 2015).

This logic flips the statutory scheme on its head. The FDCPA bans "abusive, deceptive, and unfair" practices. 15 U.S.C. 1692(a). Debt collectors cannot possibly avoid the FDCPA by suggesting that their practice is so egregious that Congress *compelled* trustees to ferret out and attack it. If these claims had any legitimate purpose, Congress would not have charged trustees with automatically objecting the moment the claims are filed. The trustees' "statutory obligation" only underscores precisely why this conduct violates the FDCPA; it hardly excuses it.

In any event, as a practical matter, trustees do *not* adequately protect debtors. Debt collectors know that trustees cannot feasibly object to every baseless claim. Trustees are charged with multiple duties and obligations, and they operate under difficult circumstances

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[33] In many situations, the cost of objecting to the time-barred debt quickly approaches the amount of the debt itself. See *Suesz* v. *Med-1 Solutions, LLC*, 757 F.3d 636, 639 (7th Cir. 2014) (en banc). Debt collectors are very aware of this dynamic, and it explains why many parties simply acquiesce in baseless filings rather than invest time and resources filing an objection.

with limited time and resources. In light of these practical constraints, trustees simply cannot wade through each and every proof of claim filed in all Chapter 13 proceedings. See *Feggins* v. *LVNV Funding LLC*, No. 13-11319-WRS, 2015 WL 7424339, at *3 n.5 (Bankr. M.D. Ala. Nov. 20, 2015) (*Feggins II*) (trustee "testified that his office processes between 6,000 and 7,000 claims each month, and that there are between 18,000 and 19,000 pending Chapter 13 cases in this district"). Midland deliberately exploits this dynamic.

3. Midland also argues that its practice does not typically harm debtors, undercutting the case for FDCPA liability: "In the event a claim for a time-barred debt is ultimately allowed, moreover, it will ordinarily have no effect on the debtor." Br. 35 (suggesting "additional allowed claim[s]" usually reallocate the same amount among all the creditors, rather than increasing what the debtor pays). This is false.

It is clearly incorrect for Chapter 13 debtors with 100% plans, who end up paying dollar-for-dollar a debt that is unenforceable outside bankruptcy. It is even wrong for debtors not repaying 100% of unsecured debt: If the bankruptcy case is dismissed or converted to Chapter 7, debtors would owe more on outstanding debts due to amounts wrongly diverted to stale claims. *In re Freeman*, 540 B.R. 129, 135 (Bankr. E.D. Pa. 2015). Midland suggests this is a rare occurrence, but this Court recently explained otherwise: "Many debtors, however, fail to complete a Chapter 13 plan successfully." *Harris* v. *Viegelahn*, 135 S. Ct. 1829, 1835 (2015) ("only one in three cases filed under Chapter 13 ends in discharge"). Moreover, Midland also overlooks the entire, common category of non-dischargeable debts: categories like "child support, alimony, and certain unpaid educational loans and taxes." *Grogan* v. *Garner*, 498 U.S. 279, 287

(1991). Every dollar devoted to a time-barred claim leaves an extra dollar unpaid on the non-dischargeable balance of those important debts.

Contrary to Midland's contention, it is very clear that its conduct exacts a real cost on debtors, not just other the courts and creditors (who also suffer as a result). This conduct is not tolerated outside bankruptcy, and there is no reason that it should be tolerated within it.

D. Midland's Conduct Created A Direct And Immediate Risk Of Concrete Harm, And Johnson Plainly Has Article III Standing To Challenge Midland's Conduct

In a single footnote, Midland argues that Johnson lacks Article III standing. Br. 36 n.7. There is a reason this argument is in a footnote. Unlike some "bare procedural violation[s]," *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016), this conduct imposes a real risk of actual harm, and it forces debtors to take action to prevent tangible injury: as in all bankruptcies, due to the clockwork claims-allowance process, debt collectors would automatically collect from the estate unless someone objects, despite filing unenforceable claims. This imposes serious risks and costs on all debtors, including Johnson.[34] Again, any debtor with a 100% Chapter 13 plan—repaying the full amount of all unsecured debt—is necessarily injured by including time-barred debts in the plan. Every penny wrongly distributed is taken from the debtor. And even debtors not repaying 100% of unse-

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[34] It also imposes serious costs on honest creditors, but Plaintiff has standing even without seeking to vindicate those creditors' interests. Cf. 15 U.S.C. 1692(e) (the FDCPA is partly designed so "debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged").

cured debts face harm: If a stale claim had been allowed and her bankruptcy case were later dismissed (or converted to Chapter 7), she would owe more on her outstanding debts due to amounts wrongly diverted to Defendants. *Freeman*, 2015 WL 6735395, at *3. And, again, any amount diverted away from non-dischargeable debts comes directly out of the debtor's pocket.

Johnson was compelled to vindicate her rights to guarantee only legitimate creditors would be paid from her future earnings. This presents a distinct risk of concrete harm, and immediate action was required to protect Johnson's rights. Midland tried to collect the actual money coming from her actual wages that would otherwise pay down her actual debts. Contrary to Midland's unusual view, Johnson has standing even though Midland's attempt to abuse the process fell short.

II. MIDLAND IS ENGAGED IN A CLEAR ABUSE OF THE BANKRUPTCY PROCESS

According to Midland, debt collectors have a "right" to file time-barred proofs of claim, despite having no good-faith belief that these claims are actually enforceable. Midland is mistaken. There is no absolute "right" (in *any* functioning legal system) to file *losing* claims. Midland's position is at odds with the Code's plain text, clear structure, and legislative purpose. Its abusive conduct burdens the bankruptcy process and harms innocent parties; it has no social value or public benefit. Midland is engaged in a clear abuse of the bankruptcy system, and the Code accordingly does not shield its misconduct under the FDCPA.

A. As Matter Of Law And Logic, There Is No "Right To Payment" For Unenforceable Claims

Midland's assertion of a "right" to file time-barred claims is incompatible with the Code's plain text. A claim is defined as a "right to payment," 11 U.S.C. 101(5)(A),

and "[t]he plain meaning of a 'right to payment' is nothing more nor less than an *enforceable obligation*," *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990) (emphasis added); accord *FCC* v. *NextWave Pers. Communs. Inc.*, 537 U.S. 293, 303 (2003); *Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998); *Johnson* v. *Home State Bank*, 501 U.S. 78, 83-84 (1991). This Court has accordingly affirmed that only "enforceable" claims are authorized under 11 U.S.C. 101(5)(A), and it is axiomatic that stale claims are *not* "enforceable." See, *e.g.*, *Crawford*, 758 F.3d at 1261 (a time-barred claim is "unenforceable"); *McMahon*, 744 F.3d at 1020 (time-barred claims are not "legally enforceable"); *Huertas* v. *Galaxy Asset Mgmt.*, 641 F.3d 28, 32 (3d Cir. 2011) (the statute of limitations "renders [the debt] unenforceable"). Because Midland has no "right to payment," it also has no "right" to file these claims, and its contrary contention is baseless.

1. Midland responds (Br. 22 & n.5) that this Court did not mean what it plainly said in (repeatedly) limiting Section 101(5)(A)'s "right to payment" to an "enforceable obligation." While Midland hopes to distinguish these cases on their facts, it overlooks that each case shares a critical common feature: all the claims at issue, unlike those here, were *legally enforceable*. See, *e.g.*, *NextWave*, 537 U.S. at 303 (discussing an *enforceable* regulatory condition); *De La Cruz*, 523 U.S. at 218 (discussing an *enforceable* award of treble damages); *Johnson*, 501 U.S. at 83-84 (discussing an *enforceable* mortgage interest); *Davenport*, 495 U.S. at 559-600 (discussing an *enforceable* restitution obligation). This commonality underscores precisely what Midland's claim lacks—"nothing more *nor less*"—and why its theory is indefen-

sible under this Court's authoritative construction of the Code.[35]

Midland also argues that it still has a "right to payment" because Alabama's time-bar "extinguishes the remedy" but not the underlying debt. Br. 17. This is exactly backwards. State law may preserve the underlying obligation, but it is no longer an "*enforceable*" obligation. See Ala. Code § 6-2-30(a) ("[a]ll civil actions must be commenced * * * within the period prescribed in this article *and not afterwards*") (emphasis added); *Huertas*, 641 F.3d at 32 ("Huerta's debt obligation is not extinguished by the expiration of the statute of limitations, *even though the debt is ultimately unenforceable in a court of law*") (emphasis added). Time-barred claims impose *moral* obligations, not legal ones. "[S]ome people might consider full debt re-payment a moral obligation even though the legal remedy for the debt has been extinguished," but the claim itself is not "legally enforceable." *McMahon*, 744 F.3d at 1020; see also *Crawford*, 758 F.3d at 1261 (time-barred claims are "unenforceable").[36]

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[35] Midland says that *Davenport* shows "a 'claim' can exist under the Code regardless of the creditor's ability to obtain a monetary judgment." Br. 22. But Johnson's point is not that all debts must be enforceable via "monetary judgment," but that there must be *some means of enforcing the debt*. *Davenport* identified a legal "enforcement mechanism" that guaranteed a "right to payment," thus satisfying *Davenport*'s own standard. 495 U.S. at 559-560. Midland's problem is not simply that it cannot enforce its claim in a civil proceeding, though it plainly cannot, see, *e.g.*, *Phillips* v. *Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); Midland's problem is that it cannot enforce its claim *anywhere*.

[36] The plain language of Alabama's limitations provision further eliminates any argument that time-barred debts are "enforceable" until the debtor objects. On its face, Alabama's time-bar expressly applies to actions *before* they are filed. While defendants might acci-

Parties have no right to share in an estate's limited assets—and divert funds from legitimate creditors—based on a "moral" obligation alone. Unless the "right" is "enforceable," it does not qualify under the Code. Because Midland has no corresponding "right to payment," it has no basis for filing a proof of claim under Section 501(a).[37]

2. Nor is Midland correct that this settled law somehow contradicts this Court's pronouncements that "rights to payment" are defined by state law, not federal law. Br. 16-17. Federal law defines "right to payment" as a legally "enforceable" right; state law determines whether a right is legally enforceable. That leaves the federal statute with its (unitary) federal meaning, while still letting "state law govern[] the substance of claims." *Travelers Cas. & Surety Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 450 (2007) (internal quotation marks omitted); see also *ibid.* ("Accordingly, when the Bankruptcy Code uses the word 'claim'—which the Code itself

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dentally forfeit or waive that protection (by malpractice or mistake), the debt is unenforceable when the claim is wrongly filed.

[37] Midland asserts that a "proof of claim" under 11 U.S.C. 501(a) must include *knowingly unenforceable claims* because 11 U.S.C. 502(b)(1) says that a "claim" can be rejected as "unenforceable." Br. 19. This is mere semantics (and bad semantics at that): That same section, using the same words, is invoked to reject *fraudulent* claims, yet no one seriously maintains that a fabricated debt is a "claim." Congress did not have to write "purported" claim in Section 502(b)(1) to convey its obvious intent. Further, Section 501(a) is restricted (for the reasons discussed above) to claims supported by a good-faith belief in their enforceability. Even if a "claim" did not mean what this Court has said it means, the Code's structure—including Section 502(b)(1)'s procedure for striking time-barred claims—underscores that Congress did not permit parties to abuse the claims-process by filing knowingly indefensible claims.

defines as a 'right to payment'—it is usually referring to a right to payment recognized under state law.") (internal citation omitted). As with virtually all other States, Alabama says that debts are *not* legally enforceable after the limitations period expires, even if the underlying obligation remains. See, *e.g.*, *Ex parte Liberty Nat'l Life Ins. Co.*, 825 So.2d 758, 765 (Ala. 2007). Midland simply misunderstands the import of this common distinction. See, *e.g.*, *Buchanan* v. *Northland Group, Inc.*, 776 F.3d 393, 396-397 (6th Cir. 2015) (Sutton, J.) (recognizing the difference between the debt itself and its enforceability); *McMahon*, 744 F.3d at 1020 (Wood, C.J.) (same); *Huertas*, 641 F.3d at 32 (same).

3. Midland asserts that Congress intended for "claim" to be defined in the "'broadest possible'" manner, so any definition that excludes stale claims is necessarily wrong. Br. 16. Yet "broadest possible" does not mean limitless or incoherent. Congress expanded the definition of "claim" in important respects, but those respects were *enumerated*: things like "liquidated," "unliquidated," "fixed," "contingent," "unmatured," and "disputed." See, *e.g.*, *In re Charter Co.*, 876 F.2d 866, 869 (11th Cir. 1989) (explaining how Congress expanded the definition by "using the following broad language"). Stale claims fall outside this statutory category. Language suggesting that "disputed" claims can be filed hardly suggests that *indisputably invalid* claims may be filed. Those claims are already resolved as a legal matter; they are not "contingent," "disputed," or "unmatured"—they are simply (and indisputably) *unenforceable*. While the Code's definition captures "all *legal* obligations of the debtor, no matter how remote or contingent" (*ibid.*) (emphasis added), Congress did not capture solely "moral" obligations, which is all Midland now pursues.

Moreover, while the Code's definition of "claim" is indeed broad, Midland misunderstands Congress's objective: it wanted a process that could afford complete relief, so that "all *legal obligations* * * * will be able to be dealt with in the bankruptcy case." *Epstein* v. *Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1576 (11th Cir. 1995). In a world in which parties could not file contingent or unmatured claims, parties would be shut out of the bankruptcy proceeding. H.R. Rep. No. 95-595, at 180 (1977). They could not share in the bankruptcy estate, and the debtor could not obtain full relief or a fresh start. Once those unresolved claims ripen, the debtor could be thrown back into debt, threatening the viability of any Chapter 13 plan and frustrating bankruptcy's objective.

Congress eliminated those concerns by widening the scope of "claims" to capture all claims with a "right to payment"—*i.e.*, an *enforceable obligation*. But nowhere did Congress suggest that this new definition of "claim" was intended to sweep in knowingly *invalid* claims. The goal was to bring all legitimate interests before the bankruptcy court. A party with a knowingly stale claim does not have any *legitimate* interest. It simply hopes to divert funds from the estate without any legal "right to payment." That behavior harms debtors and creditors alike, and there is no indication that Congress intended anyone to burden the process with such meritless claims.

Midland argues that the Code must not bar all unenforceable claims, as the Code "expressly brings claims that are not presently enforceable into the bankruptcy proceeding." Br. 18 (discussing claims that are "'contingent,' 'unmatured,' and 'disputed'"). This poses the wrong question: The Code asks whether the *obligation* is enforceable, not whether that obligation gives rise to an immediate right to sue in court. Consider, for example, a

"contingent" contract. It creates an *enforceable obligation* even if the contingency has not yet occurred. If one party disavows any future intent to perform, the other side assuredly can sue for breach.

Again, it makes sense that Congress deliberately captured all *enforceable* obligations to avoid the situation where claims ripening after bankruptcy (i) disrupt the debtor's fresh start or (ii) fail to receive a fair share of the estate (since the estate was already distributed). Neither of those concerns apply to Midland's time-barred debt, which will *never* ripen into an enforceable obligation.[38]

In short, Midland repeatedly insists that it has a "right to payment," but it cannot identify that right by *ipse dixit*; it failed to identify a single, non-voluntary, legal means of enforcing the time-barred debt. Midland can ask nicely to be repaid, but a debtor has every right to simply refuse. The lack of remedy eliminates the "right to payment," and Midland ignores the "plain meaning" of those words in suggesting otherwise. *E.g.*, *Davenport*, 495 U.S. at 559.[39]

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[38] Midland maintains that Johnson's position would "erode" the Code's protections in the automatic stay. Br. 23. First, while Midland is correct that 11 U.S.C. 362(a)(6) only applies to "claims," Midland does not mention 11 U.S.C. 362(a)(3)—which arguably precludes *any* attempt to control estate property, including attempts to collect time-barred debts. Second, unenforceable debts were not the concern or focus of the Code. Debtors are "overburdened" by *enforceable* claims, not stale claims. The automatic stay prevents parties with actual *rights* from jumping ahead in line; a debtor does not obviously need relief from time-barred claims. *Harris*, 135 S. Ct. at 1835.

[39] While Johnson believes that the best reading of "claim" excludes time-barred debts, it is easy to address Midland's concerns by recognizing "claims" to include time-barred debts, but also rec-

B. A Purported "Right" To File Time-Barred Claims Is Directly At Odds With The Code's Structure And Purpose

Midland's argument is also at odds with the structure and purpose of the Code. Debt collectors have no "right" to file knowingly time-barred claims.

First, the notion that parties have a "right" to file stale claims is directly at odds with the trustee's statutory duty to *object* to stale claims. See 11 U.S.C. 704(a)(5), 1302(b)(1). There is no reason to think that Congress embraced the pointless exercise of authorizing creditors to file a time-barred claim just so the trustee could immediately object to the same claim. Bankruptcies are sufficiently busy without make-work.

Midland's business practice wastes limited judicial and party resources with no offsetting public benefit. There is no societal value to permitting a debt collector to purchase time-barred debts for pennies on the dollar, all in the hope of flooding bankruptcy courts with "hundreds of delinquent accounts" and "unenforceable" claims. *Id.* at 1256. That does not advance the "just, speedy, and inexpensive determination of every case and proceeding." Fed. R. Bankr. P. 1001; see also, *e.g.*, *In re Sekema*, 523 B.R. 651, 655 (Bankr. N.D. Ind. 2015) (sanctioning debt collectors for filing knowingly time-barred claims, and imposing a fine that "reflects an appreciation of the system-wide burdens created by this type of misconduct").

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ognizing that parties cannot *file* a proof of claim without a good-faith basis. This preserves the automatic stay and permits the discharge of stale debts (where debtors schedule those debts to whatever gain), but does not permit the continued abuse of the bankruptcy process by the flood of knowingly time-barred claims.

Put simply: Why would any rational legislative body simultaneously grant an absolute "right" for one party to file a claim that another party has an absolute duty to reject? These time-barred claims will fail, by design, unless the trustee fails to discharge her legal obligations. That statutory design is incompatible with a purported "right" to file unenforceable claims.

Second, the entire point of the claims-process—as reflected by multiple Code provisions—is to efficiently and fairly process claims. That process is frustrated by attempts to bog down bankruptcy proceedings with knowingly invalid claims. Congress, again, would not have tasked trustees with a statutory duty to object to stale claims (11 U.S.C. 704(a)(5), 1302(b)(1)), only so debt collectors could try to slip them through. Nor would Congress have declared time-barred claims unenforceable (11 U.S.C. 502(b)(1), 558) if it wished parties to *knowingly* file unenforceable claims: there is sufficient work in every bankruptcy without inviting claims that are doomed for failure. And Congress would not have deemed claims "prima facie valid"—and presumptively enforceable—if it intended parties to file knowingly *invalid and unenforceable* claims. Compare *Gardner*, 329 U.S. at 573; Fed. R. Bankr. P. 3001(f).

The process is designed to function when all parties act in good faith; it is not designed to tolerate parties who abuse the system by filing meritless claims, all in the hope that the system breaks down and no one notices. *Young*, 789 F.3d at 879.

Nor is it necessary to include time-barred claims to achieve the primary goals of bankruptcy: a fresh start for the debtor and an equitable distribution of estate assets. A debtor does not need a fresh start from time-

barred debts; the *time-bar itself* provides the fresh start.[40]

Nor is it necessary to discharge debts to avoid future harassment from debt collectors: any debtor concerned about cutting off requests for *voluntary* repayment can always invoke 15 U.S.C. 1692c(c)—"[i]f a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer." This FDCPA provision replicates the core effect of the discharge injunction.

Likewise, stale claims are unnecessary for the equitable distribution of estate assets. The "equitable distribution" on time-barred debt is *always* zero. Those debts are unnecessary to any functioning Chapter 13 plan. They are submitted only to take unfair advantage of the process in the hope of collecting when the system malfunctions. The multiple protections built into the system to *weed out* stale claims confirms that Congress did not want to usher in those same claims. Midland's contrary view is impossible to square with the structure or purpose of the Code.

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[40] Midland also suggests that a discharge is necessary to avoid the exceedingly unlikely scenario that a debtor may somehow be subject to an unknown future suit in some hypothetical jurisdiction with a longer limitations period and no borrowing statute. Br. 25. Suffice it to say that this chain of events was unlikely on Congress's mind in deciding whether to endure the risk of not discharging stale debts. Moreover, there is no realistic concern of debtors facing discrimination for not paying stale debts (contra Pet. Br. 25); Midland overlooks other subsections of 11 U.S.C. 525 that provide expansive anti-discrimination coverage in the broadest swath of likely situations.

Finally, Midland's argument is out of step with baseline norms of good faith and acceptable litigation conduct. More specifically, courts routinely award sanctions for filing knowingly time-barred claims: "Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, as here, he makes a claim groundless in law and is subject to Rule 11 sanctions." *Brubaker* v. *City of Richmond*, 943 F.2d 1363, 1385 (4th Cir. 1991); see also, *e.g.*, *FDIC* v. *Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994); *White* v. *GM Corp.*, 908 F.2d 675, 682 (10th Cir. 1990).

That describes Midland's conduct exactly. Midland purchased time-barred debts at pennies on the dollar precisely because those debts are unenforceable. The affirmative defense is "blindingly obvious": "coming to the conclusion that the claims might be time-barred did not require either claimant to look beyond the information it already possessed." *Sekema*, 523 B.R. at 654. Nor does it matter that "the statute of limitations is an affirmative defense which must be pled or waived" (*Steinle* v. *Warren*, 765 F.2d 95, 101 (7th Cir. 1985)): "Rule 11 does not permit a plaintiff to avoid sanctions merely because the opposing party or the judge might not immediately recognize that the assertion is groundless." *Brubaker*, 943 F.2d at 1385; *Leeds Bldg. Prods.* v. *Moore-Handley, Inc. (In re Leeds Bldg. Prods.)*, 181 B.R. 1006, 1010 (Bankr. N.D. Ga. 1995); see also *In re Excello Press, Inc.*, 967 F.2d 1109, 1112-1113 (7th Cir. 1992).[41]

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[41] Alabama law applies materially indistinguishable principles: "It is one thing to file a lawsuit where the claim is of debatable legitimacy or where the defense is doubtful, but it is quite another to file a claim knowing it to be without merit or knowing that there exists a complete defense. The court system exists for the resolution of gen-

Sanctions, in short, are "appropriate if any attorney knowingly file[s] suit on an undisputedly time-barred claim." *Goins* v. *JBC & Assocs., P.C.*, 352 F. Supp. 2d 262, 272 (D. Conn. 2005). That proposition is impossible to square with Midland's alleged "right" to file time-barred claims. The entire point of a sanction is that conduct is not merely prohibited, but so egregious to warrant *punishment*. There is no such thing as a "right" to engage in sanctionable conduct. See *Feggins*, 2015 Bankr. LEXIS 2822, at *18; *Smith* v. *Asset Acceptance, LLC*, 510 B.R. 225, 226 (S.D. Ind. 2013).

Congress legislates against the backdrop of established principles like Rule 11 authority and inherent judicial power to sanction frivolous behavior. See *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 (1994). It follows that whatever "right" Congress conferred in the Code presumptively does not extend to frivolous filings. If Congress intended to create a "right" for debt collectors to file time-barred claims (without any discernible justification), Congress surely would have done so with clearer language than this.

III. MIDLAND CANNOT MEET ITS HEAVY BURDEN OF ESTABLISHING THAT THE BANKRUPTCY CODE REPEALS THESE FDCPA CLAIMS

"'[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred*

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uine disputes, and must not be used as a means of coercing a party either to pay a debt that he does not owe or be compelled to expend a greater sum to defend an illegitimate claim." *Empiregas, Inc.* v. *Feely*, 524 So.2d 626, 628 (Ala. 1988) (so holding in the context of a malicious-prosecution suit based on the filing of a knowingly time-barred claim).

Int'l, Inc., 534 U.S. 124, 143-144 (2001); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). Midland effectively concedes there is not a single line of text in the Code or the FDCPA that expressly precludes the claims at issue. Midland thus can prevail only by showing this is one of the "rare" occasions where one independent federal enactment precludes another. *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004). It most certainly is not.

First, as established above, a debt collector "can easily satisfy both mandates" (*Dep't of Trans.* v. *Pub. Citizen*, 541 U.S. 752, 767 (2004)), because the challenged conduct is forbidden under both schemes. Any debt collector who refuses to violate the Code will automatically comply with the FDCPA. There is no "positive[] repugnan[cy]" between these laws, and thus no preclusion.

Second, even if the Code somehow tolerated Defendants' conduct, there is still no "irreconcilable conflict": The claims-process is wholly permissive; no one is compelled to file a claim. Put another way: even if the Code permits Defendants' abusive conduct, it certainly does not *require* it. Thus, it cannot effect a repeal of the FDCPA by implication. There is no "irreconcilable conflict" when one scheme allows what the other forbids; one must *compel* what the other forbids. The standard is one of impossibility. *J.E.M.*, 534 U.S. at 142; *Randolph*, 368 F.3d at 730. Midland has not identified a single controlling case suggesting that a true "conflict" exists where one statute merely permits what another disallows. Mere tension may be relevant in a *preemption* analysis, but not a *preclusion* analysis. See *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). Each law operates within its proper sphere to regulate its targeted behavior. See *POM Wonderful*, 134 S. Ct. at 2239-2240; *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).

"When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful*, 134 S. Ct. at 2238. Midland's contrary view reflects a fundamental departure from well-settled doctrine.[42]

Midland hints that authorizing these FDCPA claims will flood courts with unnecessary litigation. Yet exactly the opposite is true: it is *debt collectors*, not debtors, who are creating needless work for innocent parties and busy courts. Once it is clear that courts will enforce the FDCPA as Congress intended, parties like Midland will have no choice but to respect the process and end their abusive tactics. The entire point of the FDCPA is to stop unfair practices before they begin. Without the FDCPA's deterrent, Midland has no reason to stop a practice that exacts significant costs without any redeeming benefit. These suits will deter that future misconduct, eliminating the need to expend *any* further effort grappling with baseless claims.

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[42] Midland further relies on *Kokoszka* v. *Belford*, 417 U.S. 642 (1974), a case definitively rejected as irrelevant by multiple. As those circuits explained, this Court's statements were "at minimum dicta," and at most a "gloss" on a separate issue entirely. *Simon*, 732 F.3d at 278 (describing the "garnishment provisions" in *Kokoszka*). Under the FDCPA, the question is "how debt collectors interact with debtors," not "what assets are made available" in bankruptcy. *Randolph*, 368 F.3d at 731 (likewise distinguishing *Kokoszka*). The concerns animating the FDCPA apply with full force in this context.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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RECORD
AND
BRIEF.

No. 16-348

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Miscellaneous:

Agenda Book for the Meeting of the Advisory Committee on Bankruptcy Rules (Mar. 26-27, 2009) <tinyurl.com/2009agenda> 4, 5
Collier on Bankruptcy (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016) 13, 19
Ed Flynn, *Bankruptcy by the Numbers: Chapter 13 Case Outcomes by State*, Am. Bankr. Inst. J., Aug. 2014 17
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Minutes for the Meeting of the Advisory Committee on Bankruptcy Rules (Mar. 26-27, 2009) <tinyurl.com/2009minutes> 6
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S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 8
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REPLY BRIEF FOR THE PETITIONER

Respondent's brief is long on policy arguments about the practice of filing proofs of claim for time-barred debt in bankruptcy proceedings. But it is conspicuously short on arguments about whether that practice contravenes the actual language of the Fair Debt Collection Practices Act. Tellingly, respondent devotes a substantial portion of her brief to the quixotic argument that the Bankruptcy Code does not permit the practice of filing proofs of claim for time-barred debt—an argument that no court of appeals, even the court below, has accepted.

Respondent's real complaint, however, is not that debt collectors are violating the Code, but that the system es-

tablished by the Code is not operating as Congress intended, supposedly because of the transaction costs of objecting to claims. But even if that is true—and there is good reason to believe it is not, especially given the benefits of bringing time-barred debts into the bankruptcy process—that is at most a problem of bankruptcy administration. And the solution to any such problem is for Congress or the Advisory Committee to fix the system—not for this Court to distort the FDCPA, a statute never meant to apply in bankruptcy proceedings.

There is nothing false or misleading, or unfair or unconscionable, about the filing of a proof of claim for a time-barred debt, which affirmatively puts parties in interest on notice about the existence of a potential limitations defense. Neither the Code nor the Rules require creditors to go further and certify that there is no valid limitations defense to their claims. Yet that is precisely what respondent is asking this Court to do under the guise of interpreting the FDCPA. And respondent does not dispute that such an interpretation would unleash a wave of court-clogging, lawyer-driven FDCPA litigation—mostly in cases, like this one, where the plaintiff has suffered no actual injury (and thus lacks Article III standing).

Respondent asks this Court to back into her preferred interpretation of the FDCPA by holding that certain practices *outside* bankruptcy would violate the statute and would even be sanctionable. But that approach would require the Court to bite off far more than it agreed to chew when it granted certiorari on the bankruptcy-specific questions presented here. All the Court needs to do in this case is to hold that, whatever the propriety of certain practices outside bankruptcy, there is nothing improper about engaging in a practice that the Code specifically invites. Alone among the circuits, the Eleventh Circuit has held that filing an accurate proof of claim for a time-

barred debt in a bankruptcy proceeding violates the FDCPA. That holding was erroneous, and the judgment below should therefore be reversed.

A. The Bankruptcy Code Creates A Right To File A Proof Of Claim For An Unextinguished Time-Barred Debt In A Bankruptcy Proceeding

1. Respondent contends (Br. 38-49) that the Bankruptcy Code does not permit any creditor (whether a debt collector or not) to file a proof of claim for an unextinguished time-barred debt. Even the Eleventh Circuit—the sole circuit to rule in respondent's direction on the questions presented—rejected that contention. See Pet. App. 8a-9a. This Court should reject it as well.

a. Respondent contends that a "claim" encompasses only an "enforceable" right to payment. See, *e.g.*, Br. 39. But the Bankruptcy Code defines a "claim" simply as a "right to payment," with no additional limitation to "enforceable" rights. 11 U.S.C. 101(5)(A). Taken on its terms, moreover, such a limitation is as illogical as it is atextual. The Code cannot be interpreted to reach only claims that are "enforceable"—that is, claims that could ultimately be enforced in a civil action—because that would exclude "disputed" claims that turn out to be losing ones, or "contingent" claims where the contingency never materializes. See *ibid.* The Code also provides that a "claim" should be *disallowed* if it is "unenforceable." See 11 U.S.C. 502(b)(1). Yet under the foregoing interpretation, a claim that is "unenforceable" would not be a "claim" in the first place.

Faced with these obvious problems, respondent offers a carefully engineered variation on its interpretation: the term "claim" excludes, as "unenforceable," only "knowingly invalid" claims, Br. 43 (emphasis omitted)—presumably meaning claims subject to a defense the creditor believes to be valid at the time it files its proof of claim. As

a preliminary matter, that interpretation is even more divorced from the Code's actual text, which, again, defines a "claim" to encompass every "right to payment." See p. 3, *supra*.

More fundamentally, that interpretation would subvert the Code's operation by requiring a creditor to make a pre-filing assessment both of the potential defenses to a claim and of the claim's ultimate allowability. The Code deems a claim presumptively valid absent an objection; the trustee and other parties in interest bear the burden of investigating the defense and objecting as needed. See 11 U.S.C. 502(a). For that reason, it is incorrect to characterize the claims-allowance process as "reserved for *enforceable* claims," Br. 25: the Code does not exclude "unenforceable" claims at the outset, but rather sets up a process with a burden-shifting framework for evaluating (and, where appropriate, disallowing) claims.

b. With specific regard to limitations defenses, respondent seeks to read into the Code a requirement that the Advisory Committee expressly declined to impose in the Bankruptcy Rules. As to the type of debt at issue here, the Advisory Committee required a creditor to provide certain factual information that puts parties in interest on notice as to the existence of a potential limitations defense. See Fed. R. Bankr. P. 3001(c)(3)(A). In so doing, the Advisory Committee considered and rejected a proposed rule that would have gone further, requiring a creditor to certify that there is no valid defense under the applicable statute of limitations. See *Agenda Book for the Meeting of the Advisory Committee on Bankruptcy Rules* 86 (Mar. 26-27, 2009) (*Agenda Book*) <tinyurl.com/2009-agenda>. Critically, that is the very certification that respondent asserts is implicit in every proof of claim.

Unable to reconcile its proposed interpretation with that history, respondent resorts to mischaracterizing the

Advisory Committee's work. Respondent first contends that the Advisory Committee was concerned only about the category of cases in which "creditors were genuinely unsure about the timeliness of a claim." Br. 25. But the committee notes belie that contention: in the very case that precipitated the Advisory Committee's consideration of the issue, two bulk debt purchasers filed proofs of claim; the debtor objected on timeliness grounds; and the debt buyers withdrew their claims instead of defending them. See *Agenda Book* 79-80.

Respondent further contends that the Advisory Committee expected creditors to "conduct a good-faith inquiry" as to timeliness. Br. 25. That gets it exactly backward. The Committee's working group observed that, *if* it went further and required a certification from a creditor, it would be imposing an affirmative obligation on the creditor to engage in a pre-filing investigation of any potential limitations defense. See *Agenda Book* 86. The working group refused to do so, expressing concern that placing the "initial burden" with the creditor "to make sure it was not filing a stale claim" would depart from the Code's burden-shifting framework and could thereby violate the Bankruptcy Rules Enabling Act. *Ibid.* The working group further recognized that placing such a burden on the creditor could be unfair, given that "there are too many factors involved" in the application of a limitations defense for a creditor to certify with assurance that no valid defense exists. *Ibid.*

Respondent laments (Br. 45-46) that, unless this Court adopts her interpretation of "claim," some claims for time-barred debts will be allowed. But Congress evidently did not share that concern; it surely knew that some claims would be allowed, because the statute of limitations remains an affirmative defense in bankruptcy that is forfeited if not raised. When Congress wanted to ensure that

a creditor did not recover on a claim regardless of whether another party in interest objected, it eliminated the presumption of validity and allowed the bankruptcy court to disallow the claim *sua sponte*. See 11 U.S.C. 502(d), (e)(1). Even for such claims, moreover, Congress did not impose any restrictions on the creditor's ability to file a proof of claim in the first place. See *ibid.* That underscores Congress's intent to sweep all debts into the bankruptcy process. See Pet. Br. 23-25, 45.

2. Respondent's argument is built on the assumption that, at least as to a limitations defense, it will be easy for a creditor to determine that a claim is "*indisputably invalid*." Br. 42. That assumption is incorrect.

As the Advisory Committee noted, there are many factors that go into determining whether a claim for a seemingly time-barred debt is ultimately subject to a limitations defense. See *Minutes for the Meeting of the Advisory Committee on Bankruptcy Rules* 9 (Mar. 26-27, 2009) <tinyurl.com/2009minutes>; Chamber of Commerce Br. 12-15; NACTT Br. 14-15. For example, the evaluation of a limitations defense often requires a threshold choice-of-law analysis, including consideration of any choice-of-law provision in the underlying credit agreement. Cf. Fed. R. Bankr. P. 3001(c)(3)(B) (requiring that the credit agreement be sent on request to any party in interest). The length of the limitations period may depend on the characterization of the debt under applicable state law. See, *e.g.*, Ala. Code §§ 6-2-34, 6-2-37. And additional questions must be resolved to determine whether the limitations period has in fact run, such as whether the period was restarted by the debtor's actions or whether the period was tolled. See, *e.g.*, Ala. Code § 6-2-16.

As a result, while it is easy to spot a *potential* limitations issue with the information a creditor must provide under Rule 3001, it is hard to say with certainty whether

a limitations defense actually applies. Accordingly, the Code and the Rules provide a procedure for resolving limitations issues, with the creditor supplying sufficient information to put parties in interest on notice as to the existence of a potential limitations defense, but any objecting party bearing both the initial burden of raising such a defense and the ultimate burden of proving that it applies (and that the claim should therefore be disallowed).

Respondent contends (Br. 16 n.26) that, at least in this case, petitioner knew that there was a valid limitations defense. But no record was developed on that issue in the prior proceedings before the bankruptcy court. Respondent suggests that such knowledge can be inferred from the fact that petitioner did not defend its claim against respondent's discrete objection that the claim lacked supporting documentation. Given the low value of their claims, however, "[m]ost" creditors do not incur the "cost and time of responding" to objections. 1 Rosemary E. Williams, *Bankruptcy Practice Handbook* § 7:64, at 7-170 (2d ed. 2016); 2 *id.* § 8:136, at 8-639. That was presumably what happened here, because (as respondent concedes, see Br. 16 n.26) petitioner's claim should not have been disallowed solely on the asserted ground. See J.A. 21. While the claim appeared to be time-barred, the record does not indicate whether there was some other reason that a limitations defense would not apply.

3. Beyond her effort to read an atextual limitation into the definition of "claim," respondent does not dispute that petitioner has a "right to payment" under the Code. See Br. 38-44. That is for good reason, because Alabama law establishes that a creditor holding a time-barred debt retains a "right" to payment even if the limitations period potentially extinguishes the creditor's judicial remedy. See Pet. Br. 17 (citing cases). And as respondent seemingly concedes (Br. 41), this Court has made clear that a

"right to payment" exists where the underlying right is recognized under state law. See, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979).

For its part, the government offers one additional argument. Relying on legislative history, the government contends that, notwithstanding its expansive definition of "claim," the Code creates a right to file a claim only where "*some purpose would be served.*" Br. 23 (citations omitted). But the reports the government cites do not support such a limitation. Instead, they note only that a creditor is not *obligated* to file a proof of claim, and that doing so "may simply not be necessary" in certain situations, such as when a claim has already been listed on the debtor's schedule or when there would be no distribution to the creditor even if the claim were allowed. See, *e.g.*, S. Rep. No. 989, 95th Cong., 2d Sess. 61 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 351 (1977). Here, neither of those circumstances applied, and the proof of claim thus served to bring respondent's debt within the bankruptcy process (even if the claim was ultimately disallowed). That was wholly consistent with Congress's overall goal of expanding the definition of "claim" and thus the comprehensiveness of the claims process.

4. Respondent does not seriously dispute that her interpretation of "claim" would limit the benefits to debtors of the Code's automatic-stay and discharge provisions. See Br. 44 n.39. Perhaps for that reason, respondent offers a fallback argument: even if "claim" is defined to include time-barred debts, she argues, this Court could require a creditor to have a "good-faith basis" (presumably, a belief that there are no valid defenses) before filing a proof of claim. *Ibid.* But that argument ignores the fundamental principle that any creditor—which includes any "entity that has a claim against the debtor," 11 U.S.C. 101(10)(A)—"is entitled to file a proof of claim." *Travelers*

Casualty & Surety Co. v. *Pacific Gas & Electric Co.*, 549 U.S. 443, 449 (2007). And it is hard to square with the Code's burden-shifting framework, which places the burden of assessing a potential limitations defense not on the creditor, but on the trustee and other parties in interest. See 11 U.S.C. 502(a).

As to the automatic-stay and discharge provisions, respondent contends that "[a] debtor does not need a fresh start from time-barred debts; the *time-bar itself* provides the fresh start." Br. 46-47. Not so. A creditor holding a time-barred debt may still take certain actions to collect on the debt. See Pet. Br. 24-25, 34. And while it is theoretically true that a debtor could notify a debt collector in writing that he does not wish to be contacted further, see 15 U.S.C. 1692c(c), only a debtor aware of his rights would invoke that provision, and it provides less expansive protection than the Code (which prohibits any "act to collect" by debt collectors and other entities alike, both during bankruptcy and after). 11 U.S.C. 362(a)(6), 524(a)(2).

5. Reasoning backward, respondent contends (Br. 48-49) that filing a proof of claim for an unextinguished time-barred debt would warrant sanctions and is therefore not permitted under the Bankruptcy Code. Respondent cites *In re Sekema*, 523 B.R. 651 (Bankr. N.D. Ind. 2015), for that proposition. That is the only published decision of which we are aware, however, in which a bankruptcy court has imposed sanctions under Bankruptcy Rule 9011 for filing a proof of claim for an unextinguished time-barred debt. Bankruptcy courts have overwhelmingly held that filing such a proof of claim is *not* sanctionable. See, *e.g.*, *In re Freeman*, 540 B.R. 129, 144 (Bankr. E.D. Pa. 2015); *In re Jenkins*, 538 B.R. 129, 135-136 (Bankr. N.D. Ala. 2015); *In re Keeler*, 440 B.R. 354, 366-368 (Bankr. E.D. Pa. 2009); *In re Andrews*, 394 B.R. 384, 387-388 (Bankr. E.D.N.C. 2008); *In re Varona*, 388 B.R.

705, 723-724 (Bankr. E.D. Va. 2008). Regardless of whether sanctions would be available under Civil Rule 11 for filing a *lawsuit* for a time-barred debt—a dubious proposition that would put the burden on civil plaintiffs to identify and assess affirmative defenses before filing suit[1]—the better view is that sanctions are not available under Rule 9011 in bankruptcy proceedings, where, under the governing substantive law, creditors unambiguously do not bear that burden. See p. 4, *supra*.

Even if filing a proof of claim for a time-barred debt could be sanctionable under Rule 9011, it does not follow that an FDCPA action lies for that conduct. To the contrary, the potential availability of sanctions indicates that the bankruptcy process is well equipped to deal with abusive conduct, and to do so in a calibrated way that accounts for the realities of the bankruptcy context and that applies to all creditors acting abusively (not just the subset of creditors reachable under the FDCPA). There is no valid justification to extend an entirely discrete cause of action from outside bankruptcy to address that concern.

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[1] Respondent cites three lower-court decisions for the proposition that sanctions would be available for filing a lawsuit in the face of an "obvious" affirmative defense under Rule 11. See Br. 48. But there is no consensus that it is improper litigation conduct to initiate a lawsuit in the face of an "obvious" defense (whatever that means)—even assuming Rule 11 could impose such a restriction consistent with the Rules Enabling Act. See, *e.g.*, *Ford* v. *Temple Hospital*, 790 F.2d 342, 348-349 (3d Cir. 1986); see generally David H. Taylor, *Filing With Your Fingers Crossed: Should a Party Be Sanctioned for Filing a Claim to Which There Is a Dispositive, Yet Waivable, Affirmative Defense?*, 47 Syracuse L. Rev. 1037, 1043-1050, 1052-1056 (1997). Indeed, in the specific context of limitations defenses, "it appears to be settled * * * that it is not ethically improper for a lawyer to pursue a claim in the hope that the other side will miss a statute of limitations defense." Douglas R. Richmond, Brian S. Faughnan & Michael L. Matula, *Professional Responsibility in Litigation* 17 (2d ed. 2016).

B. The FDCPA Does Not Prohibit Filing A Proof Of Claim For An Unextinguished Time-Barred Debt In A Bankruptcy Proceeding

In the section of her brief devoted to the FDCPA (Br. 21-38), respondent makes virtually no effort to demonstrate that filing a proof of claim for an unextinguished time-barred debt actually falls within the language of the relevant FDCPA provisions. Instead, respondent primarily contends that it would be bad policy to permit such filings. The FDCPA, however, is not an all-purpose tool for correcting perceived failings of the bankruptcy system. The relevant FDCPA provisions bar specific actions: using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, or using "unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. 1692f. Filing a proof of claim for a time-barred debt does not violate either of those prohibitions.

1. a. As to Section 1692e: respondent cannot make out a claim under that section because all of the representations in petitioner's proof of claim—concerning the specific facts about the debt and the existence of a right to payment under Alabama law—were entirely accurate. See *Sheriff* v. *Gillie*, 136 S. Ct. 1594, 1600-1601 (2016); pp. 7-8, *supra*. Even respondent concedes that petitioner's proof of claim "accurately stated the relevant facts." Br. 24 n.28; see Resp. Cert. Br. 6 n.4.

Relegating *Sheriff* to a footnote, respondent suggests that the proof of claim was misleading because it implicitly represented that petitioner's claim was "valid and enforceable." Br. 26 n.29. As discussed above, however, petitioner's proof of claim in no way implied anything about "enforceability" generally or the absence of a limitations defense specifically; to the contrary, it affirmatively disclosed facts that put parties on notice as to the potential

existence of such a defense. See pp. 3-4, *supra*.[2] As the name suggests, a proof of claim represents only that the claimant has a claim—that is, a "right to payment" that may be unenforceable for any number of reasons (including because it is subject to a limitations defense). See 11 U.S.C. 101(5)(A), 502(b)(1), 558. Again, respondent is seeking, this time through the FDCPA, effectively to impose the requirement that the Advisory Committee considered and rejected: namely, that filing a proof of claim carries with it a certification that there is no valid limitations defense. See pp. 4-5, *supra*.

Respondent further asserts that the proof of claim was misleading because it "cloak[ed] the claim with presumptions of 'validity.'" Br. 26. But respondent's real beef is with the Code, not with petitioner's proof of claim: it is the Code that "cloak[s]" most claims subject to legal defenses with presumptive validity, while choosing to make certain types of claims automatically disallowed. See p. 6, *supra*. That presumption does not mean that the claim is

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[2] Respondent's brief is shot through with the assertion that petitioner "knew" there was a valid limitations defense to its claim. As a preliminary matter, it is unclear why that matters under respondent's theory, because the defendant's state of mind is not an element of liability under Section 1692e or Section 1692f. Cf. 15 U.S.C. 1692k(c) (providing an affirmative defense where a violation "was not intentional and resulted from a bona fide error"). In any event, respondent's primary basis for her assertion is that petitioner was aware of the very facts that it disclosed in its proof of claim. See Br. 31-32; cf. J.A. 25 (alleging, in complaint, only that the claim was barred "on its face" based on the date of the last transaction). But respondent cannot have it both ways: if it was obvious to petitioner from those facts that there was a valid limitations defense (in fact, it was obvious only that there was a *potential* limitations issue, see pp. 6-7, *supra*), it should have been obvious to everyone else too, because those facts were all disclosed.

automatically allowed; instead, it simply assigns the burden of proof to objecting parties, reflecting Congress's policy choice as to what should happen absent any objection. See 11 U.S.C. 502(a). Respondent may prefer a different substantive regime, but it hardly follows that petitioner's proof of claim was somehow misleading.

b. Because petitioner's proof of claim was accurate by any standard, this Court need not decide whose perspective is relevant in adjudging a potentially false or misleading statement. See *Sheriff*, 136 S. Ct. at 1602 n.6. To the extent the Court reaches that question, however, the applicable standard confirms that petitioner did not violate Section 1692e.

Respondent urges this Court to adopt an "unsophisticated consumer" standard, on the ground that the claims-allowance process "often relies on consumer debtors as the ultimate backstop." Br. 27. That is entirely incorrect. For that purpose, the Code relies on *trustees*, who are obligated to "examine proofs of claims and object to the allowance of any claim that is improper" as long as "a purpose would be served," 11 U.S.C. 704(a)(5)—that is, unless "there will be no distributions to creditors" or the claim otherwise would have "no effect." 9 *Collier on Bankruptcy* ¶ 4002.05[2], at 4002-11 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016). And little wonder, for a proof of claim is filed against the *estate*, not against the debtor. See Pet. Br. 32-33; Resurgent Br. 8-10. That is why creditors submit proofs of claim to the bankruptcy court, not to the debtor; indeed, the Bankruptcy Rules do not require that the debtor even be served. See Fed. R. Bankr. P. 3001. The primary target audience for a proof of claim is thus the trustee, the party responsible for supervising the estate's distribution and the only one with a statutory obligation to examine the claim. See 11 U.S.C. 704(a)(5). It is irrelevant whether the debtor *also* sees the

proof of claim in some instances; an objection by the trustee (or any other party in interest) is sufficient for the claim to be disallowed. See 11 U.S.C. 502(a).

In addition, the debtor in this case was represented by counsel; indeed, respondent's attorney filed an objection to the proof of claim. See J.A. 20-22. An "unsophisticated consumer" standard would thus be particularly inappropriate here. In arguing to the contrary, respondent urges the Court to ignore the actual facts of this case in light of the "private-attorney-general function" of the FDCPA. Br. 28-29. But the intended recipient of a communication should obviously drive the choice of standard for evaluating whether the communication is false or misleading. In any event, the facts here are representative: there is a trustee in every case, and the debtor is represented by counsel in over 90% of cases nationwide (even if the rate in a given district may be lower, see Resp. Br. 6 n.7).

2. a. As to 15 U.S.C. 1692f: respondent's sole contention is that the filing of a proof of claim for a time-barred debt must be "unfair" or "unconscionable" because it constitutes a "flagrant misuse of the bankruptcy process." Br. 29. Respondent asserts that Congress never intended for any funds from the estate to go toward time-barred debts. See *ibid.* Again, that may be respondent's preference, but it was not Congress's: Congress chose to imbue such claims with a presumption of validity, thus ensuring that, absent objection, they would be permitted. See pp. 5-6, *supra*.

Respondent does not explain how conduct that the Bankruptcy Code affirmatively invites could be unfair or unconscionable. Indeed, at points in her brief, respondent seemingly concedes that the Code permits creditors to file proofs of claim for time-barred debts, but instead argues that the system does not operate as Congress intended

because of the transaction costs of objecting to those claims. See, *e.g.*, Br. 29-31.

As a preliminary matter, respondent exaggerates the burdens associated with filing objections. The objection process is "simple," and the costs associated with objecting are "not substantial." *Owens* v. *LVNV Funding, LLC*, 832 F.3d 726, 736 n.9 (7th Cir. 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016). Whereas a proof of claim must include specific information, an objection need only be in writing. See Fed. R. Bankr. P. 3001, 3007. Nor is respondent correct that the court must hold a hearing in order to resolve an objection; indeed, respondent's own objection was granted without one. See 11 U.S.C. 102(1)(B); *In re Pierce*, 435 F.3d 891, 892 (8th Cir. 2006); J.A. 9-10, 20-21.

Even if some claims are allowed that would be disallowed in a world without transaction costs, moreover, there is nothing improper about a creditor getting paid on a time-barred debt. After all, a creditor has a right to payment on such a claim, and it is entitled to take certain actions outside bankruptcy in an effort to collect on the debt. See p. 9, *supra*. While a valid limitations defense may limit the available options for enforcement, it does not automatically render any effort to collect on the debt unfair or unconscionable.

In addition, whatever the transaction costs associated with objecting to claims for time-barred debts more generally, respondent does not dispute that the process worked exactly as it should have in this case—without any identifiable burden on respondent. Petitioner filed its proof of claim, bringing into the bankruptcy process a debt that respondent had failed to list in her schedule. See J.A. 12-19. After respondent's attorney filed a one-sen-

tence objection, the claim was disallowed without any additional effort from respondent or the trustee. See J.A. 10, 21.

b. Even assuming, *arguendo*, that a substantial number of claims for debts with valid limitations defenses are in fact allowed—an empirical proposition respondent does not attempt to establish—that is at most a problem of bankruptcy administration. Respondent does not dispute that the Code provides a mechanism for raising and resolving objections to claims for time-barred debts. If the system is not operating as Congress intended, the solution is for Congress or the Advisory Committee either to address any administrative difficulties (say, by providing additional funding to trustees) or to alter the system (say, by amending the statute or rules for processing such claims). The solution is decidedly not to use the blunt instrument of the FDCPA—a statute never meant to apply in bankruptcy proceedings—to address perceived challenges in bankruptcy administration. Such challenges should be addressed by those familiar with the intricacies and practical realities of bankruptcy, rather than through court-clogging, lawyer-driven FDCPA suits.

3. Again reasoning backward, respondent contends (Br. 32-37) that, because filing a civil action in state court on an unextinguished time-barred debt would violate the FDCPA, filing a proof of claim for such a debt must do so as well. But this Court has not tackled the broader question whether filing a civil action on a time-barred debt would violate the FDCPA, and it need not do so here. While respondent creates the impression that it is settled law in the lower courts that filing a civil action would violate the FDCPA, we are not aware of any court of appeals that has actually so held in a case squarely presenting the question. Instead, the cases respondent cites appear to assume, without independent analysis, that filing such a

suit presents an FDCPA problem. See Br. 32-33. And to the extent those cases assume that the filing is false or misleading under Section 1692e, they are difficult to square with this Court's subsequent decision in *Sheriff*.

Even assuming that filing a civil action in state court would be unfair or unconscionable under Section 1692f, it does not follow that filing a proof of claim in bankruptcy would be as well. Whereas a civil action is directed at a (likely unrepresented) debtor, a proof of claim is directed at the bankruptcy estate: the creditor is making a claim against the estate's assets, and allowance of the claim will ordinarily have no impact on the debtor. See Pet. Br. 32, 35-36.[3] In addition, the procedures set out by the Code and the Rules, including the disclosures required by Rule 3001, make it much easier for the trustee, other creditors, or the debtor to identify and raise a timeliness objection. See *id.* at 31-32. For those reasons, every court of appeals to have considered the question (except for the court below) has concluded that, even if filing a civil action in state court would violate the FDCPA, filing a proof of claim in bankruptcy does not. See *In re Dubois*, 834 F.3d 522, 530-533 (4th Cir. 2016), petition for cert. pending, No. 16-707 (filed Nov. 23, 2016); *Owens*, 832 F.3d at 734-737; *Nelson* v. *Midland Credit Management, Inc.*, 828 F.3d 749, 751-752 (8th Cir. 2016), petition for cert. pending, No. 16-757 (filed Dec. 12, 2016). This Court should do the same.

4. In the wake of respondent's brief, it is now clear that respondent has suffered no injury in fact and thus

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[3] Respondent contends (Br. 36) that, even if the allowance of a claim for a time-barred debt has no immediate impact on the debtor, it may eventually have an impact because many Chapter 13 cases fail. But a substantial percentage of those cases are refiled or converted to Chapter 7, where the allowance of an additional claim will ordinarily have no impact. See Ed Flynn, *Bankruptcy by the Numbers: Chapter 13 Case Outcomes by State*, Am. Bankr. Inst. J., Aug. 2014, at 40, 78.

lacks Article III standing. Respondent does not identify any injury that she actually incurred or that this suit could redress. In particular, respondent does not assert that she suffered any harm from her bankruptcy attorney's filing the one-sentence objection to petitioner's claim.

Instead, respondent contends only that she has standing because petitioner's conduct "imposes a real risk of actual harm." Br. 37. But a "threatened injury must be certainly impending" to qualify as an Article III injury in fact. *Clapper* v. *Amnesty International USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted). By the time respondent filed her FDCPA suit, any threatened injury, far from being "certainly impending," had completely evaporated: *the bankruptcy court had disallowed petitioner's claim.* See J.A. 5, 10. Contrary to the government's suggestion (Br. 29), it is thus academic whether "respondent would * * * have suffered any harm if petitioner's claim had been allowed"; petitioner's claim *was not* allowed, and respondent thus *did not* suffer any harm.[4]

Nor is respondent's lack of standing anomalous. The same problem appears to exist in the three other cases in which petitions for certiorari on the same questions are currently pending. See *Nelson*, *supra*; *Dubois*, *supra*; *Owens*, *supra*. And if there were ever a case in which a claim was allowed *and* the debtor suffered an identifiable injury (for example, because the debtor had a 100% repayment plan), an FDCPA action would likely be precluded, because the debtor would impermissibly be collaterally challenging the bankruptcy court's decision to allow the

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[4] To the extent respondent focuses on the "risks and costs" that she says are imposed on *other debtors*, Br. 37, those are plainly insufficient to confer standing on *her*. See, *e.g.*, *Blum* v. *Yaretsky*, 457 U.S. 991, 999 (1982).

claim. See 4 *Collier on Bankruptcy* ¶ 502.02[3][d], at 502-16.

In short, the absence of an injured plaintiff—both here and in many other cases—reflects the lawyer-driven nature of the proposed cause of action. And the absence of standing is an additional reason to overturn the decision below.

C. To The Extent The FDCPA Could Be Read To Prohibit Filing A Proof Of Claim For An Unextinguished Time-Barred Debt, The Bankruptcy Code Precludes Such Application Of The FDCPA

Finally, even if the FDCPA could be interpreted to prohibit petitioner's conduct, the Bankruptcy Code would preclude that application of the FDCPA. Respondent offers only the briefest of responses to petitioner's arguments on that score, and her response lacks merit.

Respondent contends that the Bankruptcy Code and the FDCPA are "capable of coexistence." Br. 49 (citation omitted). That is true—but not under respondent's (and the Eleventh Circuit's) interpretation of the FDCPA. As respondent reads the two statutes, they do not "complement each other," *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014); instead, one statute (the Bankruptcy Code) creates a right to engage in conduct that the other (the FDCPA) prohibits. The mere fact that a debt collector could choose not to file a proof of claim is of no moment; a conflict exists because the Code "entitle[s]" a debt collector to take that action. *Travelers*, 549 U.S. at 449. Respondent does not dispute that the FDCPA is at best ambiguous on the question presented here. For that reason, the Court should construe the FDCPA to avoid a conflict with the Code.

Respondent does not so much as mention any of this Court's decisions cited in petitioner's opening brief on the issue of conflicting federal statutes, other than to deride

as "dicta" the Court's discussion of the issue in *Kokoszka* v. *Belford*, 417 U.S. 642 (1974). See Br. 51 n.42. But that is incorrect, and *Kokoszka*'s reasoning is on all fours here. There, the Court recognized that the Consumer Credit Protection Act and the bankruptcy laws must be interpreted to "coexist." See 417 U.S. at 650. And because the CCPA was concerned not with "the *administration* of a bankrupt's estate," but rather with "the *prevention* of bankruptcy in the first place," the Court construed the relevant CCPA provision to apply only outside bankruptcy proceedings, leaving it to the Bankruptcy Act to provide "protection and remedy" to a debtor *within* bankruptcy—even though the CCPA was actually the later-enacted of the two statutes. *Id.* at 650-652.

The same reasoning applies *a fortiori* here, where the FDCPA was the earlier-enacted statute. Like the CCPA—the statute to which the FDCPA was appended—the FDCPA was intended to prevent bankruptcy, not to regulate it. To the extent respondent raises policy concerns about "the *administration* of a bankrupt's estate," that is a matter to be addressed by Congress or the Advisory Committee in regulating the "delicate balance" of the bankruptcy system. *Kokoszka*, 417 U.S. at 651. In an effort to address those perceived policy concerns, the Eleventh Circuit improperly extended the FDCPA into the domain of the bankruptcy laws. Its interpretation of the statute is untenable, and its judgment should therefore be reversed.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 16-348

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a creditor violates the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, by filing an accurate proof of claim in a bankruptcy proceeding for an unextinguished time-barred debt that the creditor knows is judicially unenforceable.

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Butner v. *United States*, 440 U.S. 48 (1979) 19
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Heintz v. *Jenkins*, 514 U.S. 291 (1995) 31, 32
Jerman v. *Carlisle, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573 (2010) 14
Kelly v. *Robinson*, 479 U.S. 36 (1986) 18
Kimber v. *Federal Fin. Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987) 15
Kokoszka v. *Belford*, 417 U.S. 642 (1974) 31
McMahon v. *LVNV Funding, LLC*, 744 F.3d 1010 (7th Cir. 2014) 15
National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 18
Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986) 18

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Advisory Comm. on Bankr. Rules, *Meeting of March 26-27, 2009, San Diego, California, Agenda* (Mar. 26-27, 2009), http://www.uscourts.gov/sites/default/files/fr_import/BK2009-03.pdf 22, 23
Black's Law Dictionary (6th ed. 1990) 31
Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016* (Mar. 2016), http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf 3
Fed. Trade Comm'n:
Collecting Consumer Debts: The Challenges of Change (Feb. 2009), https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf 3
The Structure and Practices of the Debt Buying Industry (Jan. 2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf 3, 4, 15
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 23
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 23

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U.S. Courts, *Bankruptcy Forms: Forms 106D and 106E/F*, http://www.uscourts.gov/forms/bankruptcy_forms (last visited Dec. 20, 2016) 4

Fred O. Williams, *State statutes of limitation for credit card debt*, http://www.creditcards.com/credit-card-news/credit-card-state-statute-limitations-1282.php (last updated July 12, 2016) 3

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

The Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692 *et seq.*, authorizes the Consumer Financial Protection Bureau (CFPB) to "prescribe rules with respect to the collection of debts by debt collectors, as defined in [the FDCPA]." 15 U.S.C. 1692*l*(d). The CFPB, the Federal Trade Commission (FTC), and other federal agencies are responsible for enforcing the Act through administrative proceedings and civil litigation. 15 U.S.C. 1692*l*(a)-(c). In addition, United States Trustees, who are appointed by the Attorney General, are charged with supervising the administration of bankruptcy cases. 28 U.S.C. 581-589a. The United States therefore has a substantial interest in the Court's resolution of the question presented.

STATEMENT

1. a. Congress enacted the FDCPA in 1977 in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. 1692(a). Congress found that "[e]xisting laws * * * are inadequate to protect consumers," and that "the effective collection of debts" does not require "misrepresentation or other abusive debt collection practices." 15 U.S.C. 1692(b) and (c). The Act accordingly subjects a "debt collector"—a defined term that refers to "third-party collectors of consumer debts," *Sheriff* v. *Gillie*, 136 S. Ct. 1594, 1598 (2016)—to various procedural and substantive requirements that are designed to "eliminate abusive debt collection practices" and to "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged," 15 U.S.C. 1692(e).

The Act prohibits debt collectors from, *inter alia*, "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, and specifically bars debt collectors from making a "false representation of * * * the character, amount, or legal status of any debt," 15 U.S.C. 1692e(2)(A). The Act further provides that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. The Act authorizes civil actions against "any debt collector who fails to comply with any provision of [the FDCPA] with respect to any person." 15 U.S.C. 1692k.

b. Petitioner is a debt collector that regularly purchases accounts with overdue balances and attempts to collect the past-due amounts. Pet. App. 3a. "Debt

collection is a $13.7 billion dollar industry," consisting of "approximately 6,000 collection agencies" and affecting approximately "35% of Americans, more than 77 million people." CFPB, *Fair Debt Collection Practices Act: CFPB Annual Report 2016*, at 8 (Mar. 2016).[1] A "substantial part" of the debt-collection business involves "debt buying." *Id.* at 10; see FTC, *Collecting Consumer Debts: The Challenges of Change* 13 (Feb. 2009).[2] Debt buying typically involves bundling debt into portfolios that "generally share common attributes," including "the type of credit issued" and "the elapsed time since the consumer accounts went into default." FTC, *The Structure and Practices of the Debt Buying Industry* 17 (Jan. 2013) (2013 FTC Report).[3] "[D]ebt buyers generally pa[y] less for older debts than for newer ones." *Id.* at 23. One FTC analysis of debt-buying practices from 2006 to 2009 shows that debt buyers paid on average 7.9 cents per dollar for debts less than three years old, 3.1 cents per dollar for debts three to six years old, 2.2 cents per dollar for debts six to 15 years old, and effectively nothing for debts more than 15 years old. *Id.* at 22-24.

c. Every State has adopted a limitations period for suits to collect unpaid debts. See, *e.g.*, Fred O. Williams, *State statutes of limitation for credit card debt*[4] (col-

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[1] http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

[2] https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf.

[3] https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[4] http://www.creditcards.com/credit-card-news/credit-card-state-statute-limitations-1282.php (last updated July 12, 2016).

lecting state laws). Although limitations periods vary, most are between three and six years, and no State has a limitations period longer than 15 years. 2013 FTC Report 42. Expiration of a limitations period typically does not extinguish a debt, but it precludes the creditor from recovering on the debt through the use of judicial processes.[5] *Ibid.* In most States, a consumer must invoke the statute of limitations as an affirmative defense. *Id.* at 45.

2. A debtor commences a voluntary bankruptcy case by filing a petition in bankruptcy court. 11 U.S.C. 301. Individual debtors typically file for relief under Chapter 7 of the Bankruptcy Code (Code), which provides for a liquidation of a debtor's non-exempt assets in exchange for a discharge of pre-petition debts, 11 U.S.C. 701 *et seq.*; or under Chapter 13, which provides for the adjustment of debts of an individual with regular income, 11 U.S.C. 1301 *et seq.* An individual debtor must file with the bankruptcy petition, *inter alia*, a list of his secured and unsecured creditors. 11 U.S.C. 521(a)(1)(A); Fed. R. Bankr. P. 1007(a); U.S. Courts, *Bankruptcy Forms: 106D and 106E/F*. The Code defines "creditor" to mean any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. 101(10)(A). The term "claim" is defined to include a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. 101(5)(A). This Court has

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[5] In Mississippi and Wisconsin, the expiration of a limitations period for collecting a debt extinguishes the debt. Miss. Code Ann. § 15-1-3 (Supp. 2011); Wis. Stat. Ann. § 893.05 (West 1997).

explained that "[t]he plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation." *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990).

A creditor with a claim against a debtor "may file a proof of claim," 11 U.S.C. 501(a), which consists of a "written statement setting forth a creditor's claim," Fed. R. Bankr. P. 3001(a). A "proof of claim executed and filed in accordance with [the Federal Rules of Bankruptcy Procedure] shall constitute prima facie evidence of the validity and amount of the claim," Fed. R. Bankr. P. 3001(f), and the claim is "deemed allowed" unless a party in interest to the bankruptcy proceeding (*e.g.*, the debtor, the trustee, or another creditor) files an objection to the claim, 11 U.S.C. 502(a).

The Code establishes a mechanism for disallowing unenforceable claims. Any party in interest may object to a proof of claim, 11 U.S.C. 502(a), and the trustee in a Chapter 13 bankruptcy "shall," "if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper," 11 U.S.C. 704(a)(5), 1302(b)(1). When a party objects to a claim that "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured," the bankruptcy court must disallow it. 11 U.S.C. 502(b)(1). The Code further specifies that the bankruptcy estate (which is created when a debtor files a bankruptcy petition) "shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation." 11 U.S.C. 558.

3. a. In March 2014, respondent filed a Chapter 13 bankruptcy petition. Pet. App. 3a. Several months later, petitioner filed a proof of claim in respondent's bankruptcy, seeking repayment of $1879.71. *Ibid.* Petitioner had purchased that debt from Fingerhut Credit Advantage. *Ibid.* The last transaction on that account was in May 2003, and the applicable statute of limitations for a creditor to collect on that debt is six years. *Ibid.*; Ala. Code § 6-2-34 (LexisNexis 2014). Respondent objected to the proof of claim on the ground that it did not contain supporting documentation, J.A. 21, and the bankruptcy court disallowed the claim, see J.A. 10 (Docket entry No. 22).

b. Respondent sued petitioner in the United States District Court for the Southern District of Alabama, alleging that petitioner's filing of a proof of claim for time-barred debt violated the FDCPA because it was deceptive and misleading under Section 1692e and was unfair and unconscionable under Section 1692f. Pet. App. 3a-4a, 19a; see J.A. 23-28. Petitioner moved to dismiss, arguing that the Bankruptcy Code precluded any right to relief the FDCPA otherwise might give respondent, and that respondent's allegations failed in any event to state a claim under the FDCPA. Pet. App. 19a.

The district court granted petitioner's motion to dismiss. Pet. App. 18a-37a. The court acknowledged that, under circuit precedent, the filing of a proof of claim in bankruptcy for a time-barred debt violates the FDCPA. *Id.* at 19a (citing *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1256-1257 (11th Cir. 2014), cert. denied, 135 S. Ct. 1844 (2015)). The court held, however, that this prohibition was in irreconcilable tension with the Bankruptcy Code provision

permitting a creditor to file a proof of claim. *Id.* at 20a-37a. The district court concluded that the Code had impliedly repealed the relevant prohibitions in the FDCPA, at least as applied to the filing of a proof of claim for an unextinguished debt that a creditor knows is time-barred. *Id.* at 31a n.17.

c. The court of appeals reversed and remanded. *Id.* at 1a-15a. The court stated "that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations." Pet. App. 7a. It held, however, that "when a particular type of creditor—a designated 'debt collector' under the FDCPA—files a knowingly time-barred proof of claim in a debtor's Chapter 13 bankruptcy, that debt collector will be vulnerable to a claim under the FDCPA." *Ibid.*

The court of appeals held that the doctrine of implied repeal had no application in this case because "[t]he FDCPA and the Code are not in irreconcilable conflict." Pet. App. 11a. The court explained that the two statutes, which "provide different protections and reach different actors," "can be reconciled" because "[t]he Code establishes the ability to file a proof of claim, while the FDCPA addresses the later ramifications of filing a claim." *Id.* at 12a (internal citation omitted). The court further explained that, "when a debt collector, as specifically defined by the FDCPA, files a proof of claim for a debt that the debt collector knows to be time-barred, that creditor must still face the consequences imposed by the FDCPA for a 'misleading' or 'unfair' claim." *Id.* at 13a. The court also emphasized that the FDCPA contains a "safe harbor for creditors who may file proofs of claim that are time-barred, if those filings arose from a good-faith

belief resulting from a recording error that the statute of limitations had not in fact run on the claim." *Id.* at 14a n.1 (citing 15 U.S.C. 1692k(c)).

SUMMARY OF ARGUMENT

The FDCPA prohibits a debt collector from filing a proof of claim in a bankruptcy for a debt that the debt collector knows is time-barred.

A. Outside bankruptcy, a plaintiff who knowingly files a time-barred suit is subject to sanctions for litigation misconduct. That is so even though most jurisdictions treat expiration of a statute of limitations as an affirmative defense. In the debt-collection context, a plaintiff will typically be well-positioned to ascertain the facts needed to determine whether a suit is timely. When a debt collector sues or threatens to sue to collect a debt it knows is time-barred, it violates the FDCPA's prohibitions on "misleading" representations and on "unfair" means of debt collection. That understanding accords with the consistent holdings of the federal courts of appeals that have addressed the issue.

B. The same general rules apply in bankruptcy. Contrary to petitioner's argument, the Code does not authorize the filing of a proof of claim for a debt that the creditor knows is unenforceable under applicable law. The Code directs that a claim for a time-barred debt should be disallowed. A creditor that knowingly files such a claim is subject to sanctions under Federal Rule of Bankruptcy Procedure 9011, and potentially to other remedies for bankruptcy abuse. The fact that the Code contains other mechanisms designed to prevent such claims from actually being paid does not alter that conclusion.

In bankruptcy as in other contexts, the FDCPA prohibits a debt collector from invoking judicial processes to collect a debt that the collector knows is time-barred. When a debt collector knows that a claim is time-barred and therefore unenforceable in bankruptcy, the filing of a proof of claim is misleading and unfair, in violation of the FDCPA.

Although the Code allows the trustee and other creditors to object to a proof of claim for a time-barred (or otherwise unenforceable) debt, the volume of bankruptcy litigation makes it inevitable that some such proofs of claim will escape detection. The deliberate filing of proofs of claim for debts known to be time-barred reflects a calculated effort to exploit the imperfections of the Code's disallowance mechanisms, and to prevent the claims-allowance process from functioning as Congress intended. Many such proofs of claim, moreover, are submitted by debt buyers who are able to purchase time-barred debts for pennies on the dollar precisely because those debts are understood to be legally unenforceable. And, contrary to petitioner's argument, the improvident allowance of proofs of claim for time-barred debt often harms the individual debtor as well as other creditors.

C. The Code does not effect an implied repeal of the FDCPA or otherwise preclude application of the Act to petitioner's conduct. To a large extent, petitioner's preclusion and implied-repeal arguments rest on the same mistaken premise—*i.e.*, that the bankruptcy laws authorize creditors to file proofs of claim for debts they know are time-barred—that underlies petitioner's contention that such practices are not "misleading" or "unfair" within the meaning of the FDCPA. Because the Bankruptcy Code and Rules

prohibit all creditors from engaging in that conduct, application of the FDCPA to debt collectors who do so would not create any conflict between the Code and the Act.

Petitioner also suggests that, even if the knowing submission of a proof of claim for a time-barred debt is properly viewed as an abuse of the bankruptcy process, the only remedies for such abuse are those established by the bankruptcy laws themselves. But the FDCPA applies by its plain terms to debt collectors' invocation of judicial processes in the course of their collection efforts, and the courts of appeals that have addressed the question have consistently held that a debt collector violates the Act if it initiates a civil suit to collect a debt it knows is time-barred. Petitioner identifies no sound reason to treat bankruptcy litigation as an exception to the general rule that a debt collector's litigation misconduct may subject it to liability under the FDCPA.

ARGUMENT

THE FDCPA PROHIBITS A DEBT COLLECTOR FROM FILING A PROOF OF CLAIM IN A BANKRUPTCY FOR A DEBT THAT THE DEBT COLLECTOR KNOWS IS TIME-BARRED

Outside bankruptcy, a creditor may be sanctioned for filing a debt-collection suit that the creditor knows is time-barred under state law. If that creditor is an FDCPA "debt collector," filing or threatening to file such a suit would violate the Act's prohibition on misleading representations and unfair practices in connection with the collection of a debt. Within bankruptcy, a creditor who files a proof of claim for a debt that the creditor knows is time-barred is similarly subject to sanctions. And when that creditor is a debt

collector, it violates the FDCPA. Nothing in the Bankruptcy Code suggests that a creditor is entitled to file a proof of claim for a debt that it knows is time-barred, and nothing in the Code precludes the application of the FDCPA to debt collectors who engage in that abusive practice.

A. The FDCPA Prohibits A Debt Collector From Filing Suit Outside Bankruptcy Seeking To Collect A Debt That The Debt Collector Knows Is Time-Barred

1. Outside bankruptcy, a plaintiff who files a suit that the plaintiff knows is time-barred is subject to sanctions for filing a frivolous suit and potentially for acting in bad faith. Federal Rule of Civil Procedure 11 requires attorneys (and unrepresented parties), *inter alia*, to certify when filing in court any "pleading, written motion, or other paper" that, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," "the claims, defenses, and other legal contentions" in the filing "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). On its face, that Rule demands that a plaintiff (through counsel) must undertake a reasonable inquiry into whether any claims she plans to assert in federal court are supported by non-frivolous legal arguments.

Federal courts of appeals agree that a plaintiff violates Rule 11 if information in her hands or easily accessible to her shows that her claim is barred by an "obvious" affirmative defense. See, *e.g.*, *FDIC* v. *Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994); *Brubaker* v. *City of Richmond*, 943 F.2d 1363, 1384-1385 (4th Cir. 1991); *White* v. *General Motors Corp.*, 908 F.2d 675,

682 (10th Cir. 1990), cert. denied, 498 U.S. 1069 (1991); see also *Tura* v. *Sherwin-Williams Co.*, 933 F.2d 1010, 1991 WL 88346, at *1 (6th Cir. 1991) (Tbl.) (unpublished); *Steinle* v. *Warren*, 765 F.2d 95, 101 (7th Cir. 1985). A plaintiff need not forbear from filing suit if she has a non-frivolous argument that a generally applicable affirmative defense would not prevail in her case, or if she needs discovery to assess the strength of a potential affirmative defense. *White*, 908 F.3d at 682; see *Calhoun*, 34 F.3d at 1299. But when the plaintiff has all the information necessary to identify a clearly meritorious affirmative defense, she can be sanctioned under Rule 11 if she files suit.[6]

Thus, while a limitations bar is generally treated as an affirmative defense that must be raised by a defendant or waived, Rule 11 requires a plaintiff to consider whether an "obvious" limitations bar applies before filing a complaint. That is so in part because a potential plaintiff typically possesses all the information needed to determine whether a limitations period has expired. Thus, while the defendant typically bears the burden of pleading a statute-of-limitations defense, "[a] pleading requirement for an answer is irrelevant to whether a complaint is well grounded in law." *Brubaker*, 943 F.2d at 1384. To treat the knowing assertion of a time-barred claim as a legitimate litigation practice would be to embrace the notion that, "because of the ignorance of one's adversary, one could advance a claim groundless in law." *Id.* at 1385.

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[6] A potential defendant can waive a statute of limitations defense. If a potential plaintiff and a potential defendant agree out of court to settle a time-barred claim through a court-enforced consent decree, the plaintiff would not violate Rule 11 by simultaneously filing a complaint and a proposed consent decree.

In the context of debt collection, the existence of a valid limitations defense is often easy for a potential plaintiff to ascertain. The owner of a debt knows (or should know) the date of the last transaction on an account (or the date of another event that would trigger the running of the limitations period) and can easily ascertain the length of the applicable statute of limitations. That is particularly so when the plaintiff is a debt buyer, which will have previously ascertained the age (and thus the likely enforceability) of a debt in deciding how high a price to pay. See pp. 2-3, *supra*. The owner of a debt is also well-positioned to assess whether there exists any non-frivolous basis (such as tolling) for avoiding an otherwise-applicable limitations bar. Under the rule applied by every court of appeals that has considered the issue, a plaintiff outside the bankruptcy context engages in sanctionable conduct when it knowingly files a time-barred debt-collection suit.

2. The FDCPA makes it unlawful for a debt collector to "use any false, deceptive, or misleading representations or means in connection with the collection of any debt," including by making a "false representation" about "the character, amount, or legal status of any debt." 15 U.S.C. 1692e(2)(A). The FDCPA also prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect a debt." 15 U.S.C. 1692f.

When a debt collector sues or threatens to sue to collect a debt that it knows is time-barred, the debt collector violates the FDCPA. The filing of a suit, or the threat to file a suit, is an implicit representation that the plaintiff has a good-faith basis to believe that the underlying debt is legally enforceable. When a

debt collector knows that the expiration of an applicable limitations period has rendered the debt legally unenforceable, the filing of a suit or the threat to file a suit is a misrepresentation of the "character" or "legal status" of the debt. 15 U.S.C. 1692e(2)(A). Because the FDCPA prohibits representations that are "misleading" as well as statements that are "false," a debt collector's implicit representation that an unenforceable debt is enforceable can violate the FDCPA even if the debt collector does not make an explicit false statement. See *Buchanan* v. *Northland Grp., Inc.*, 776 F.3d 393, 396 (6th Cir. 2015) (Sutton, J.) (explaining that the FDCPA "outlaws more than just falsehoods"). The federal courts that have addressed the issue "have consistently held that a debt collector violates the FDCPA by filing a lawsuit or threatening to file a lawsuit to collect time-barred debt." *In re Dubois*, 834 F.3d 522, 527 (4th Cir. 2016), petition for cert. pending, No. 16-707 (filed Nov. 23, 2016); see *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1259 (11th Cir. 2014) (collecting cases), cert. denied, 135 S. Ct. 1844 (2015). As in the Rule 11 context, that is true even though the expiration of a limitations period is an affirmative defense.[7]

When a debt collector knows that a debt is not judicially enforceable, filing or threatening to file a collec-

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[7] The FDCPA contains a safe harbor under which a debt collector can avoid liability "if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c); see generally *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573 (2010). But when a debt collector who knows that a debt is time-barred initiates or threatens to initiate legal action, it violates the Act.

tion suit also violates the FDCPA's prohibition on using unfair means of collecting a debt. 15 U.S.C. 1692f. In most jurisdictions, a consumer's partial payment on a time-barred debt or a promise to resume payments on such a debt will restart the statute of limitations for the entire amount of the debt—a fact that most consumers are unlikely to know. 2013 FTC Report 47; see Pet. Br. 17. When faced with the threat of legal action to enforce a debt that the consumer may not know is judicially unenforceable, a consumer may offer (or be invited to offer) a small partial payment to forestall judicial action, without knowing the legal consequences of that step. A debt collector thus violates the FDCPA's prohibition on using "unfair" practices when it induces or invites a consumer to remit partial payment for an unenforceable debt by giving the consumer the false impression that the debt is legally enforceable. See *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (debt collector violated FDCPA by sending letter that offered to "settle" debt because that language gave the misleading impression that the debt was legally enforceable); *Ehsaunddin* v. *Wolpoff & Abramson*, No. 06-cv-708, 2007 WL 543052, at *4 (W.D. Pa. Feb. 16, 2007) ("[T]he fact that the statute of limitations defense could be waived by the unsuspecting consumer against whom a lawsuit is filed appears to present the precise situation that the FDCPA was designed to thwart.").

More generally, statutes of limitations "are not simply technicalities," *Board of Regents of the Univ.* v. *Tomanio*, 446 U.S. 478, 487 (1980), but reflect strong public-policy determinations about the unfairness of subjecting an adversary to suit after a speci-

fied period of time, *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). See *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) ("Statutes of limitations 'promote justice by preventing surprises through * * * revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'") (quoting *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S 342, 348-349 (1944)). Those policy concerns have particular salience in the consumer-debt context. After the passage of many years, a consumer may not remember, or may lack the documentation needed to prove, the facts establishing a limitations defense. And "even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense." *Kimber* v. *Federal Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987). When a debt collector attempts to evade the effect of a statute of limitations with misleading partial truths, the debt collector violates the FDCPA.[8]

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[8] In its opening brief, petitioner does not address whether a debt collector violates the FDCPA by filing or threating to file suit on a debt that the plaintiff knows is time-barred. Petitioner's amicus DBA International, Inc. (DBA) is a trade association representing agencies that purchase debt on the secondary market. DBA Amicus Br. 1-2. DBA operates a certification program that certifies debt-buying companies holding approximately 80% of the purchased debt nationwide. *Id.* at 2. Petitioner is certified under that program. *Id.* at 5. Certification in the program requires certified companies to conform to the program's standards. *Id.* at 2. One of those standards governs the collection of time-barred debt and directs that a "Certified Company shall not knowingly

B. A Debt Collector Violates The FDCPA When It Files A Proof Of Claim In Bankruptcy For A Debt That It Knows Is Time-Barred

As explained above, outside bankruptcy, an attempt to use legal process to enforce a debt that a creditor knows is time-barred can trigger sanctions under Federal Rule of Civil Procedure 11, and it violates the FDCPA if the plaintiff is a "debt collector." Neither the Bankruptcy Code nor the FDCPA suggests that a different rule should apply in bankruptcy. A creditor that knowingly files a proof of claim for a time-barred debt can be sanctioned under Federal Rule of Bankruptcy Procedure 9011, the bankruptcy counterpart to Rule 11. And, as the court below correctly held, an FDCPA "debt collector" violates the Act if it engages in that conduct.

1. Nothing in the Bankruptcy Code authorizes enforcement of a time-barred claim

Petitioner argues (Br. 18-22) that a creditor has a "right" or "entitle[ment]" to file a proof of claim for a debt that the creditor has no good-faith basis to believe is judicially enforceable. Petitioner relies on the Code's statement that a creditor "may file a proof of claim," 11 U.S.C. 501(a), and on its provision of a mechanism for disallowing claims that cannot be enforced in bankruptcy, 11 U.S.C. 502(b)(1). Recognition of such a "right" would subvert the careful claim-sifting process that is critical to the proper administration of bankruptcy cases.

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bring or imply that it has the ability to bring a lawsuit on a debt that is beyond the applicable statute of limitations, even if state law revives the limitations period when a payment is received after the expiration of the statute." *Id.* at 3 (citation omitted).

a. Section 501 of the Code states that "[a] creditor * * * may file a proof of claim." 11 U.S.C. 501(a). Contrary to petitioner's argument, however, that generalized permission does not speak to the specific question whether a creditor may legitimately file a proof of claim for a debt that it knows is time-barred. "In expounding [on] a statute, [a court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy." *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) (quoting *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 221 (1986)) (citations omitted). "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)) (citation omitted).

Section 501(a) is simply one element of the larger claim-sifting process in bankruptcy. As petitioner acknowledges (Br. 19), other Code provisions are designed to ensure that time-barred claims are *not* paid. Section 502(b) of the Code states that a claim "shall" be "allow[ed]" *unless* "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. 502(b)(1). A time-barred claim is "unenforceable against the debtor and property of the debtor[] under * * * applicable law," *ibid.*, and petitioner recognizes (Br. 19) that such a claim should be "disallowed, with the result that it will not be paid by the estate." See 11 U.S.C. 558 (providing that a bank-

ruptcy "estate shall have the benefit of any defense available to the debtor * * * , including statutes of limitations"); *Owens* v. *LVNV Funding, LLC*, 832 F.3d 726, 739 (7th Cir. 2016) (Wood, C.J., dissenting) (explaining that, when the statute of limitations on a debt expires, "the bankruptcy process is one of the avenues of collection that" is "close[d] off for the creditor"), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016). That approach is consistent with the bedrock bankruptcy-law principle that "[p]roperty interests are created and defined by state law," *Butner* v. *United States*, 440 U.S. 48, 55 (1979), which, *inter alia*, typically defines the period of time during which a debt will remain enforceable.

The Code thus reflects Congress's determination that, if a debt is unenforceable outside of bankruptcy, a claim for that debt should be disallowed in bankruptcy as well. Petitioner emphasizes (Br. 17-18) that it has a right to payment on its claim, even if the only available means of collection is to ask the debtor for voluntary repayment. But a proof of claim submitted in a bankruptcy case "is no mere request on moral grounds to turn money over from the bankruptcy estate to the claimant: it is a legal mechanism through which the payment of the claim can be compelled, if the claim is not disallowed by the bankruptcy court." *Owens*, 832 F.3d at 739 (Wood, C.J., dissenting). Submission of a proof of claim therefore is properly understood, not simply as a representation that the debtor is morally obligated to pay a particular sum, but as a representation that the creditor has a good-faith basis to believe that it is entitled to payment under applicable bankruptcy and non-bankruptcy law. Nothing in the Code suggests that a creditor may

legitimately submit a proof of claim that it knows is subject to disallowance under the Code.

Petitioner argues (Br. 18-19) that a claim for a time-barred debt is unenforceable in bankruptcy only when a trustee or other party in interest objects to a proof of claim. As explained above, however, federal courts have consistently held (and petitioner's opening brief does not dispute) that a plaintiff who knowingly files a time-barred suit can be sanctioned for litigation misconduct, even though the statute of limitations is an affirmative defense. See pp. 11-13, *supra*. Nothing in the Code suggests that Congress intended to be more solicitous of time-barred claims in the bankruptcy context. Rather, inside as outside bankruptcy, the propriety of invoking judicial process to enforce a debt depends on whether the creditor has a good-faith basis to believe that the debt is judicially enforceable.

b. When a creditor files a proof of claim in bankruptcy seeking to enforce a debt the creditor knows is time-barred, that filing may trigger sanctions under Federal Rule of Bankruptcy Procedure 9011. Like Federal Rule of Civil Procedure 11, Rule 9011 states that, "[b]y presenting to the court" any "paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, * * * the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Bankr. P. 9011(b)(2). Federal Rule of Bankruptcy Procedure 3001(f) provides that "[a] proof of claim executed and filed in conformance with these rules shall constitute prima

facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). Thus, when a creditor (or its attorney) files a proof of claim, it implicitly represents that the underlying claim is "valid[]," *ibid.*, and enforceable in bankruptcy. Such a certification is not "warranted by existing law," Fed. R. Bankr. P. 9011(b)(2), when the creditor knows that the claim is time-barred because the Code specifically provides that time-barred claims should be disallowed.

Petitioner contends (Br. 18-19) that, by providing a mechanism for objecting to and disallowing time-barred claims, the Code affirmatively "*invites* claims for time-barred debts to be brought into the bankruptcy process" even when the persons who submit them lack any good-faith basis for believing them to be timely. Br. 19 (emphasis added). That is incorrect. In bankruptcy, as in ordinary civil litigation, a limitations bar is an affirmative defense that may be waived if it is not promptly asserted. But Rule 9011 requires in bankruptcy what Rule 11 requires in other civil-litigation contexts: that parties and attorneys forbear from seeking to enforce claims that they know are time-barred. See pp. 11-13, *supra*.

Petitioner also invokes (Br. 5, 12, 20) Federal Rule of Bankruptcy Procedure 3001, which specifies the particular facts that must be included in a proof of claim for a consumer debt, including the date of the account holder's last transaction, the date of the last payment on the account, and the date the account was charged to profit and loss. Fed. R. Bankr. P. 3001(c)(3)(A). Petitioner contends (Br. 20) that, by requiring each proof of claim to include that information, which helps debtors and others to identify and object to time-barred claims, the rules "authorize the

filing of proofs of claim for time-barred debts." That is a non sequitur. The fact that the bankruptcy rules contain other protective measures, designed to reduce the likelihood that time-barred claims will be improvidently allowed, does not suggest that the deliberate filing of such claims is a legitimate bankruptcy practice.

Petitioner relies (Br. 20-21, 28) on a proposed amendment to Rule 3001 that the Advisory Committee on Bankruptcy Rules (Advisory Committee) considered and rejected in 2009. The amendment would have required creditors to affirmatively state in a proof of claim that the claim is timely under the relevant statute of limitations. As petitioner notes (Br. 20-21), the Advisory Committee instead chose to require the disclosure of information that would allow debtors and trustees to more easily ascertain whether a particular claim is time-barred. See Advisory Comm., *Meeting of March 26-27, 2009, San Diego, California, Agenda* 87 (Mar. 26-27, 2009) (*Advisory Committee Agenda*).[9]

In explaining its rejection of the proposed amendment, however, the Advisory Committee emphasized "the need for claimants to properly investigate their claims before filing proofs of claim"; noted that "Rule 9011 imposes an obligation on a claimant to undertake an inquiry reasonable under the circumstances to determine to the best of the claimant's knowledge, information, and belief that a claim is warranted by existing law and the factual contentions have evidentiary support"; and suggested that the proof-of-claim form be amended to require a declaration under pen-

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[9] http://www.uscourts.gov/sites/default/files/fr_import/BK2009-03.pdf.

alty of perjury that the information provided is correct. *Advisory Committee Agenda* 87. Although the Advisory Committee acknowledged that requiring such a declaration would "not address[] the statute of limitations issue," the Committee noted that the declaration "would impress upon the claimant the importance of ensuring the accuracy of the information provided." *Ibid.* When Congress enacted the 1978 Code, the House Report explained that Section 501 "is permissive only" and "permits filing *where some purpose would be served.*" S. Rep. No. 989, 95th Cong., 2d Sess. 61 (1978) (emphasis added); H.R. Rep. No. 595, 95th Cong., 1st Sess. 351 (1977) (same). No valid bankruptcy purpose is served when a creditor invokes judicial process to attempt to collect an unenforceable debt.

2. The FDCPA's bans on misleading representations and unfair practices prohibit debt collectors from filing proofs of claim in bankruptcy on debts they know are time-barred

a. By filing a proof of claim, a debt collector implicitly represents that it has a good-faith basis to believe that the claim is enforceable in bankruptcy. That understanding is reinforced by the Code and Rule provisions that "deem[]" any underlying claim "allowed" absent an objection, 11 U.S.C. 502(a); that declare a proof of claim to be prima facie evidence of the validity of the underlying claim, Fed. R. Bankr. P. 3001(f); and that require a certification that the claim is "warranted by existing law," Fed. R. Bankr. P. 9011(b)(2). When a debt collector knows that a claim is time-barred and therefore unenforceable in bankruptcy, the filing of a proof of claim is misleading and unfair, in violation of the FDCPA. By representing

that a time-barred debt is enforceable in bankruptcy, a debt collector mischaracterizes "the character" and the "legal status" of the debt, in violation of 15 U.S.C. 1692e(2)(A).

Petitioner asserts (Br. 27-28) that its proof of claim was "accurate with regard to the 'legal status' of the debt" because it "contained all the information required by Bankruptcy Rule 3001." But the FDCPA prohibits not only false representations, but also *misleading* representations. The inclusion of both prohibitions in the same provision demonstrates that the statue bans some representations that are factually accurate but are likely to mislead the relevant audience. Such a practice is also "unfair" within the meaning of the FDCPA because a creditor that knowingly files a proof of claim for a time-barred debt seeks money that it can obtain only if the bankruptcy system fails to operate as Congress intended. A debt collector that attempts to game the system by hoping that the debtor and trustee will fail to notice or assert an ironclad affirmative defense (and by requiring a debtor or trustee to expend energy and resources to identify and assert a limitations defense that the creditor is already aware of) engages in the type of abusive conduct the FDCPA is intended to prohibit.

b. Petitioner argues (Br. 29) that, unlike the typical debt-collection communication, which is directed to an individual consumer debtor, its proof of claim was directed to respondent's attorney and the Chapter 13 trustee. While recognizing (*ibid.*) that courts generally analyze whether particular conduct violates the FDCPA's prohibition on misleading representations by asking whether an unsophisticated consumer would be misled, petitioner urges this Court to adopt a dif-

ferent "competent attorney" standard with respect to bankruptcy proofs of claim. That argument ignores the fact that many bankruptcy filers are unrepresented. But in any event, this Court need not decide whether an unsophisticated-consumer or competent-attorney standard applies to a debt collector's proof of claim. Cf. *Sheriff* v. *Gillie*, 136 S. Ct. 1594, 1602 n.6 (2016) (declining to decide whose perspective is relevant in assessing whether a representation is misleading). Filing a proof of claim constitutes an implicit representation that there is a good-faith basis to believe the claim is enforceable in bankruptcy and "is warranted by existing law." Fed. R. Bankr. P. 9011(b)(2). A debt collector's submission of a proof of claim for a debt that the creditor knows is time-barred therefore is misleading under either an unsophisticated-consumer or competent-attorney standard.

c. Petitioner argues (Br. 31-34) that knowingly filing a proof of claim for a time-barred debt is not "unfair" under the FDCPA because the Code both establishes mechanisms to oppose untimely claims and affords various other protections to debtors in bankruptcy. Petitioner also suggests (Br. 37-38) that, at least in a case (like this one) where the debtor or trustee has successfully objected to the underlying proof of claim, any FDCPA suit represents an inappropriate attempt by "plaintiffs' lawyers" to profit from "technical violations" of the Act. Those arguments lack merit.

The Code instructs that, "if a purpose would be served," the trustee should "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. 704(a)(5); see Pet. Br. 29-30. Numerous courts have recognized, however, that trustees cannot realistically be expected to identify every time-

barred (or otherwise unenforceable) claim filed in every bankruptcy. See, *e.g.*, *In re Edwards*, 539 B.R. 360, 365 (Bankr. N.D. Ill. 2015) ("In districts like this with a large number of chapter 13 cases, * * * trustees typically object to claims only if they are filed after the claims bar date or improperly seek priority treatment.") (footnote omitted); see also *Owens*, 832 F.3d at 740 (Wood, C.J., dissenting); *In re Feggins*, 540 B.R. 895, 901 n.5 (Bankr. M.D. Ala. 2015), aff'd, *LVNV Funding, LLC* v. *Feggins*, No. 15-cv-893, 2016 WL 4582061 (M.D. Ala. Sept. 2, 2016). And even apart from the costs imposed when particular time-barred claims are improvidently allowed, the large-scale submission of such claims (see pp. 26-27, *infra*) diverts trustee resources from other tasks and thus hinders the administration of the bankruptcy system. A trustee's separate obligation to object to invalid claims therefore does not negate a creditor's duty to refrain from filing claims it knows are legally unenforceable.

That is particularly so because the knowing submission of a proof of claim for a time-barred debt represents a deliberate effort to exploit the imperfections of the alternative safeguards that petitioner identifies. A creditor that submits such a claim can gain a practical advantage only if the claims-allowance process fails to operate as Congress intended. A creditor that files a claim for a time-barred debt thus is "exploiting a weakness in the bankruptcy system and preying on potential error to collect debts where it should not." *In re Dubois*, 834 F.3d at 535 (Diaz, J., dissenting).

Such time-barred claims are often submitted, moreover, by companies whose business model depends on the legal unenforceability of the relevant

debts. The "business of buying stale claims and filing proofs of claim in bankruptcy to collect on them * * * appears to be a big and prosperous business." *In re Edwards*, 539 B.R. at 365. Debt buyers are able to purchase time-barred debt for pennies on the dollar precisely because all parties to that transaction know that the debt is unenforceable. And, given the low cost of acquiring such debt, the large-scale submission of proofs of claim in bankruptcy may be profitable even if most such claims are objected to and disallowed. Each knowing submission of a time-barred claim should be recognized for what it is: a deliberate effort to collect a legally unenforceable debt through an implicit misrepresentation that the debt remains enforceable. Such submissions are much more than "technical violations" (Pet. Br. 37) of the FDCPA, even in instances where a timely objection prevents the creditor from achieving its illicit aim.[10]

Petitioner also asserts that filing a proof of claim for a time-barred debt does not implicate the FDCPA's consumer-protection purposes because allowance of such a claim "will ordinarily have no effect on the debtor" (Br. 35), but instead "primarily affects the interests of other creditors" (Br. 36).[11] In

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[10] The government recently sued one of petitioner's amici, Resurgent Capital Services, L.P. (Resurgent), for abuse of process under 11 U.S.C. 105(a). The complaint alleges that, over a six-year period, Resurgent filed more than 142,000 proofs of claim for debts, some dating back to the 1980s, that it knew were time-barred and on which it collected more than $12 million. *In re Davis*, No. 14-20400-DRD13, Adv. No. 16-2018, at ¶¶ 36-37, 41 (Bankr. W.D. Mo.); see also *In re Freeman-Clay*, No. 14-41871-DRD13, Adv. No. 16-4102 (Bankr. W.D. Mo.).

[11] Amicus United States Chamber of Commerce contends (Br. 23) that the FDCPA does not apply to proofs of claim because a

many circumstances, however, allowance of a time-barred claim can harm a Chapter 13 debtor. If a Chapter 13 plan provides for 100% recovery for unsecured creditors, payment of a time-barred claim will take money directly from the debtor. If (as occurs in many Chapter 13 cases) a case is dismissed before completion of the plan, some amount of money from the portion of the debtor's disposable income that is dedicated to payments under the plan will have gone to pay the time-barred claim rather than to pay valid claims. When the bankruptcy fails, the debtor will consequently owe more on the valid claims than he would have if the invalid claim had not been included in the bankruptcy.

Even if a plan succeeds, moreover, payments made to time-barred creditors will reduce payments to any unsecured creditors whose claims are not discharged. In this case, for example, a majority of respondent's unsecured debt was more than $50,000 in student-loan obligations. Bankr. Ct. Doc. 1, at 17-18 (Dec. 7, 2012). If petitioner's claim had been allowed, any payments made on that claim would have reduced the amount of student-loan debt respondent repaid, thereby increasing the post-bankruptcy principal and interest respondent would still owe on that nondischarged debt after bankruptcy. See 11 U.S.C. 523(a)(8), 1328(a)(2). Petitioner is therefore wrong in arguing (Br. 36 n.7)

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proof of claim is an attempt to collect a debt from the bankruptcy estate and (in the amicus's view) the FDCPA "regulates attempts to collect financial obligations only from natural persons." That is incorrect. The relevant FDCPA prohibitions are not limited to communications made directly to consumers. Rather, they apply to "any * * * representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, and to any "means to collect or attempt to collect any debt," 15 U.S.C. 1692f.

that respondent would not have suffered any harm if petitioner's claim had been allowed.

Equally meritless is petitioner's suggestion (Br. 31-32) that the availability of sanctions under Rule 9011 is sufficient to deter the type of behavior the FDCPA is designed to prohibit. Like its civil counterpart, Rule 9011 contains a safe haven that prohibits the imposition of sanctions if an offending paper is "withdrawn" within 21 days after a motion for sanctions is filed. Fed. R. Bankr. P. 9011(c)(1). A debt collector therefore can adopt a business model of filing multiple proofs of claim for time-barred debts, anticipating that some will be improvidently allowed and intending to withdraw the rest as soon as objections are raised, without incurring any risk of sanctions under Rule 9011.

In sum, filing a proof of claim for a debt that a debt collector knows is time-barred serves no valid bankruptcy purpose, undermines the claims-sifting process established by Congress, and violates the FDCPA. As one court of appeals judge has explained:

> At best, a debt collector who files such a claim wastes the trustee's time. At worst, the debt collector catches the trustee asleep at the switch and collects on an invalid claim to the detriment of other creditors and, in many cases, the debtor. In either case, the debt collector misleadingly represents to the debtor that it is entitled to collect through bankruptcy when it is not.

In re Dubois, 834 F.3d at 534 (Diaz, J., dissenting).

3. The Bankruptcy Code does not preclude application of the FDCPA to bankruptcy proofs of claim

Petitioner argues (Br. 38) that, "[e]ven if the FDCPA could be read to prohibit the filing of a proof of claim for an unextinguished time-barred debt, the Bankruptcy Code would preclude that application of the FDCPA." See Br. 38-45. Petitioner contends (Br. 43-45) in the same vein that Congress's enactment of the Code in 1978 effected an implied repeal of any such prohibition that the FDCPA might previously have imposed. Those arguments lack merit.

a. To a large extent, petitioner's preclusion and implied-repeal arguments rest on the same mistaken premise that underlies petitioner's contention that the knowing submission of a proof of claim for a time-barred debt is not "misleading" or "unfair" within the meaning of the FDCPA. Thus, petitioner contends that, "[i]f interpreted to prohibit filing a proof of claim for an unextinguished time-barred debt, the FDCPA would patently conflict with the Code, *which expressly authorizes that very practice*." Br. 40 (emphasis added). As explained above, the italicized language reflects a misunderstanding of the Bankruptcy Code and Rules, which prohibit all creditors from filing proofs of claim for debts they know are time-barred. See pp. 17-23, *supra*. Treating the conduct alleged in this case as an FDCPA violation therefore would not penalize petitioner for actions that the Code authorizes or encourages, or otherwise create any conflict between the Act and the Code.

b. Petitioner also suggests (Br. 40) that, even if the knowing submission of a proof of claim for a time-barred debt is properly viewed as an abuse of the bankruptcy process, the only remedies for such abuse

are those established by the bankruptcy laws themselves. Thus, petitioner argues (*ibid.*) that treating the conduct alleged here as an FDCPA violation would "substitute the FDCPA's broader remedies in place of the Code's own carefully calibrated ones and supplant the authority of bankruptcy courts to police conduct occurring within a bankruptcy proceeding." Relying on *Kokoszka* v. *Belford*, 417 U.S. 642, 651 (1974), petitioner contends that the FDCPA should not be construed to apply to the actions a debt collector takes in a bankruptcy case because "[n]othing in the text or legislative history reflects any intent to interfere with the 'delicate balance' of the bankruptcy system." Br. 41 (quoting *Kokoszka*, 417 U.S. at 651). Those arguments are misconceived.

The FDCPA prohibitions at issue here apply only to creditors that fall within the Act's definition of "debt collector." Those prohibitions govern, *inter alia*, the "representation[s]" that debt collectors may make "in connection with the collection of any debt," 15 U.S.C. 1692e, and the "means" they may use "to collect or attempt to collect any debt," 15 U.S.C. 1692f. By its plain terms, that language encompasses efforts by FDCPA debt collectors to invoke judicial processes in the course of their debt-collection efforts. See *Heintz* v. *Jenkins*, 514 U.S. 291, 294 (1995) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings.") (quoting *Black's Law Dictionary* 263 (6th ed. 1990)).

Consistent with that understanding, the courts of appeals that have addressed the question have consistently held that a debt collector violates the FDCPA if it initiates a civil suit to collect a debt it

knows is time-barred. See p. 14, *supra*. That is so even though additional remedies (such as Rule 11 sanctions) for the same litigation misconduct may be available in the underlying debt-collection suit. And petitioner's opening brief does not dispute the general proposition that the FDCPA can apply to litigation-related misconduct committed by debt collectors.

Petitioner identifies no sound reason to treat bankruptcy litigation as an exception to that general rule. When a debt collector files a proof of claim in bankruptcy, it attempts "to obtain payment" of a debt by "legal proceedings." *Heintz*, 514 U.S. at 294. Petitioner's argument would logically imply that, even if a debt collector's proof of claim affirmatively misstates the facts bearing on a potential limitations (or other) defense, the FDCPA should be displaced in deference to the purportedly exclusive remedies provided by the Code and Bankruptcy Rules. Nothing in the Code suggests that Congress intended such an exception to the rules that generally govern debt collectors' conduct.

The effect of the court of appeals' decision in this case is simply to make additional remedies available when a particular type of creditor (an FDCPA debt collector) commits a type of bankruptcy abuse (the filing of a proof of claim for a debt the creditor knows is time-barred) that is forbidden to all creditors. Imposition of such additional remedies on a class of creditors that the FDCPA singles out for targeted regulation is fully consistent with the text and purposes of both the Act and the Code. And "[w]hen two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the

operation of the other." *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 16-348

Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.,
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Broadrick v. LVNV Funding LLC (In re Broadrick),
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Buckley v. Bass & Assocs.,
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758 F.3d 1254 (11th Cir. 2014) ..... *passim*

Dubois v. Atlas Acquisitions LLC (In re Dubois),
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Gen. Motors Acceptance Corp. v. Bell (In re Bell),
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McMahon v. LVNV Funding, LLC,
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MSR Exploration, Ltd. v. Meridian Oil, Inc.,
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Nelson v. Midland Credit Mgmt., Inc.,
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Owens v. LVNV Funding, LLC,
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Paglia v. Ski Bank (In re Paglia),
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Phillips v. Asset Acceptance, LLC,
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Ramirez v. Palisades Collection LLC,
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Simmons v. Roundup Funding, LLC,
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Taylor v. First Resolution Inv. Corp.,
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Ga. Code § 9-3-25 17

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Other Authorities

Ernst &Young, *The Impact of Third-Party Debt Collection on the National and State Economies in 2013* (July 2014), http://www.acainternational.org/economicimpact.aspx. 8

Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013) , https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf. 7

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

Interest of the *Amicus Curiae*[1]

ACA International, the Association of Credit & Collection Professionals, is a Minnesota nonprofit corporation with offices in Washington, D.C., and Minneapolis, Minnesota.

Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers.

ACA company members range from small businesses with a few employees to large, publicly

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[1] No counsel for any Party authored this brief in whole or in part. Neither any such counsel nor any Party made a monetary contribution intended to fund this brief's preparation or submission. No person (other than Amicus Curiae ACA International, its members, and its counsel) made such a monetary contribution.

All the Parties have granted their written consent under Rule 37.3(a) for ACA International to file an *amicus curiae* brief.

held corporations. They include small businesses that operate within a single community or state, and large corporations doing business in every state. But most ACA company members are small businesses, collecting rightfully owed debts on behalf of other small and local businesses. Of ACA's member organizations, 86 percent have fewer than 50 employees, and 48 percent have fewer than nine employees.[2]

Summary of Argument

The credit-and-collection industry fulfills an important economic function, and must be able to perform that function with respect to debt that may be time-barred. Debt collectors and debt buyers are an extension of every community's businesses, whose combined effort has resulted in the annual recovery of billions of dollars that would otherwise constitute losses on those businesses' financial statements. Without an effective collection process, the economic viability of these businesses — and, by extension, the American economy in general — is threatened. The economic and social benefit that

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[2] Josh Adams, *ACA International White Paper, Small Businesses in the Collection Industry: An Overview of Organization Size and Employment* 2 (Aug. 2016), http://www.acainternational.org/files.aspx?p=/images/40363/aca-wp-smallbusiness.pdf.

the credit-and-collection industry provides apply with no less force to time-barred debt, or debt that *may* be time-barred, than to any other debt. There may also be reasons why the *debtor* wants to resolve an otherwise time-barred debt. If a debt collector cannot work with the debtor on resolving debt that may be time-barred, then both the creditor and the debtor may end up worse off.

For years, the credit-and-collection industry has relied on a long and consistent series of judicial opinions under which the Bankruptcy Code and the Fair Debt Collection Practices Act have operated alongside each other: a debt collector or a debt buyer could participate in the bankruptcy process without running afoul of the Fair Debt Collection Practices Act, and could submit a proof of claim as to a debt — even a time-barred debt — in the bankruptcy process so that the bankruptcy estate could be administered in an orderly and complete manner and so that the debt could be discharged or otherwise disposed of under the bankruptcy law. The Eleventh Circuit's holding in *Crawford v. LVNV Funding, LLC*,[3] called that longstanding and consistent interpretation into question, and has caused confusion in the credit-and-collection industry. Under the Eleventh Circuit's holding, a debt collector or a debt buyer may run afoul of the Fair Debt Collection Practices Act by doing nothing

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[3] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

more than presenting a time-barred debt to a bankruptcy court for administration as part of a bankruptcy estate. As a result, at least in the Eleventh Circuit, debt collectors and buyers are less likely to present such debts in the bankruptcy process — with the result that the bankrupt debtor may not obtain the complete relief to which the debtor is otherwise entitled. That result is unfair to the debt collectors and buyers — not only because it is substantively unfair, but because the law should not force those collectors and buyers (and their attorneys) into the Hobson's choice of either filing a proof of claim and facing liability under the Fair Debt Collection Practices Act, or being excluded from the bankruptcy process in order to avoid such liability. But that result can also be unhealthy for the debtor, in that it could prevent the resolution of unpaid debt that the debtor may want discharged for any number of reasons.

Whether a debt is stale usually depends on simple facts, which the Rule 3001 disclosure elicits — but determining whether the debt is stale then requires the application of law to those facts. That determination is also simple in many cases — but not always. Even in the simplest cases, determining whether a debt is subject to a limitations defense involves several basic questions:

- What law applies?
- Under the governing law, what is the applicable statute of limitations?

- Has the statute of limitations been tolled? Has it been reset?

State law governs a debt's enforceability, and statutes of limitations differ from state to state. And even within a state, correctly categorizing a debt may expose a debt collector to error. While a non-lawyer debt collector may be able to reach an informed view about whether a debt is subject to a limitations defense, that view may be mistaken in the absence of a more sophisticated legal analysis. To impose that burden, and the concomitant risk of liability, on debt collectors acting in good faith goes far beyond any duty that Congress imposed on debt collectors under the Fair Debt Collection Practices Act. Rule 3001 established a new regime that substitutes disclosure for liability.

Federal Rule of Bankruptcy Procedure 3001 requires the disclosure, in "a statement . . . filed with the proof of claim," of the relevant facts from which a debt's timeliness can be ascertained. Thus, the Bankruptcy Rules already require that a claimant provide information to determine whether a debt is stale. Compliance with that requirement — that is, truthfully furnishing all the information from which the debtor, the trustee, the bankruptcy court, and other creditors may "assess[] the timeliness of the claim" — should be enough to avoid liability for any alleged violation of the Fair Debt Collection Practices Act.

If a debt collector cannot file a proof of claim as to a stale debt without violating the Fair Debt

Collection Practices Act, then fewer proofs of claim will be filed as to such debts. Keeping a debt out of bankruptcy is especially problematic where the potentially time-barred debt is not, in fact, time-barred — that is, where the debt collector decides that the risk of taking a mistaken view of the law outweighs the risk of forgoing collection of a legitimate and fully collectible debt. That result is unfair to the debt collectors and to creditors. But that result can also be unhealthy for the debtor, in that it could prevent the discharge of the unpaid debt that the debtor may have forgotten to include in his or her bankruptcy petition. If the stale debt is not discharged, then it may still be subject to collection, because it was not included in the bankruptcy discharge. And if the debt is not actually stale, then it may still result in litigation against the debtor. In either case, the debtor will not have gotten the "fresh start" that the Bankruptcy Code promises. An old debt that is not discharged in the bankruptcy — especially if the debt is not actually outside the statute of limitations —could prevent the resolution of unpaid debt that the consumer may want to settle for any number of reasons. The omission of an old debt from the bankruptcy will also deprive the debtor of the benefits of a bankruptcy discharge, such as protection against discriminatory treatment based on the omitted debt.

Argument

I. The credit-and-collection industry fulfills an important economic function, and must be able to perform that function with respect to debt that may be time-barred.

As part of the process of attempting to recover outstanding payments, ACA members and debt collectors more generally are an extension of every community's businesses. Debt collectors work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members and other debt collectors has resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Without an effective collection process, the economic viability of these businesses — and, by extension, the American economy in general — is threatened. Recovering rightfully owed consumer debt lets organizations survive; helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls.[1]

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[1] *See, e.g.*, Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* i (Jan. 2013) ("Debt buying can reduce the losses that creditors incur in providing credit, thereby allowing creditors to provide more credit at

In 2013, Ernst &Young conducted a study to measure the various impacts of third-party debt collection on the national and state economies. In addition to recovering rightfully-owed consumer debt totaling $44.9 billion in 2013 alone, the study found that third-party debt collectors directly provided over 136,000 jobs and $6.4 billion in payroll. When factoring in jobs created indirectly, those numbers doubled to 231,000 jobs and $12.4 billion in payroll. Third-party debt collectors paid $687 million in state and local taxes and $724 million in federal taxes. The total state and local tax impact of third-party debt collectors was $1.3 billion, and the total federal impact was $1.4 billion.[5]

The economic and social benefit that the credit-and-collection industry provides apply with no less force to time-barred debt, or debt that *may* be time-barred, than to any other debt. A dollar collected on a stale debt works just as hard to keep prices and taxes down, to keep workers employed, and to keep a business open as does a dollar collected on a more recent obligation. A statute of

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lower prices."), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[5] Ernst &Young, *The Impact of Third-Party Debt Collection on the National and State Economies in 2013* (July 2014), http://www.acainternational.org/economicimpact.aspx.

limitation is a choice that society makes to limit the remedies available to a creditor or collector seeking to collect old debt, and any such limitation serves a useful purpose "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[6] But each such limitation comes at a price — because it deprives some business, or some government, or some individual, or some other creditor of income to which it was lawfully entitled before the bar of the limitation period fell. That tradeoff should not be any more burdensome to the creditor or collector than losing the right to a judicial remedy already makes it.

There may also be reasons why the *debtor* wants to resolve an otherwise time-barred debt. Outside the bankruptcy context, courts often recognize the sense of "moral obligation" that may lead a debtor to resolve a debt subject to a limitations defense.[7] There may be other reasons besides "moral obligation" as well:

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[6] *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944).

[7] *See, e.g., McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) ("We do not hold that it is automatically improper for a debt collector to seek repayment of time-barred debts; some people might consider full debt repayment a moral obligation, even though the legal remedy for the debt has been extinguished.").

- A debt subject to a limitations defense may remain on a debtor's credit report for up to seven years,[8] which is longer than the statute of limitations in many states, thereby affecting the debtor's credit even though a judicial remedy is no longer available.
- A lender may require repayment of a debt subject to a limitations defense as a condition for extending new credit.[9]
- A lender may ask that the debtor disclose any unresolved default in an application for new credit.
- A professional licensing agency may ask the debtor about any unresolved default.
- The debtor may want to relieve a joint obligor from the collateral consequences of the debtor's default.[10]

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[8] *See* 15 U.S.C. § 1681c(a)(4).

[9] *See In re Brady*, 171 B.R. 635, 639–40 (Bankr. N.D. Ind. 1994) ("The court agrees with those decisions holding that a creditor has the right to condition its acquiescence to a reaffirmation agreement upon the reaffirmation of other indebtedness. The court believes that reaffirmation is an 'invitation to negotiation' and that either party may decline to reaffirm for any reason." (quoting *Gen. Motors Acceptance Corp. v. Bell (In re Bell)*, 700 F.2d 1053, 1056 (6th Cir. 1983)).

- The debtor may want to keep a guaranty from being invoked, especially if the statute of limitations has not run on the guaranty even though it may have run on the underlying debt.[11]

If a debt collector cannot work with the debtor on resolving debt that may be time-barred, then both the creditor and the debtor may end up worse off.

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[10] *See Paglia v. Ski Bank (In re Paglia)*, 302 B.R. 162, 167–68 (Bankr. W.D. Pa. 2003) ("acting out of filial loyalty, [debtor] himself took the initiative and volunteered to execute the second note so defendant would not take legal action against his mother's annuity").

[11] *Broadrick v. LVNV Funding LLC (In re Broadrick)*, 532 B.R. 60, 74 (Bankr. M.D. Tenn. 2015) ("For example, if the debtor's parents are also obligated on a debt, the debtor might want to see a creditor paid, particularly if the statute of limitations has not run on the parents' guaranty even though there was arguably a statute of limitations defense for the debtor.").

II. The credit-and-collection industry has relied on a long and consistent series of judicial opinions under which a debt collector or a debt buyer can participate in the bankruptcy process without running afoul of the Fair Debt Collection Practices Act, but the Eleventh Circuit's anomalous approach has caused confusion throughout the industry.

For years, the credit-and-collection industry has relied on a long and consistent series of judicial opinions under which the Bankruptcy Code and the Fair Debt Collection Practices Act have operated alongside each other: a debt collector or a debt buyer could participate in the bankruptcy process without running afoul of the Fair Debt Collection Practices Act,[12] and could submit a proof of claim as

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[12] *See, e.g.*, *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 95 (2d Cir. 2010) ("Federal courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action."); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002) ("While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code."); *Buckley v. Bass & Assocs.*, 249 F.3d 678, 681 (7th Cir. 2001) ("such claims are outside the scope of the Fair Debt Collection Practices Act"); *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 U.S. Dist. LEXIS 6933, at *15–18 (N.D. Ill. Apr. 19, 1999).

to a debt — even a time-barred debt — in the bankruptcy process so that the bankruptcy estate could be administered in an orderly and complete manner and so that the debt could be discharged or otherwise disposed of under the bankruptcy law. From the Bankruptcy Code's enactment in its current form in 1978,[13] it took two decades before anyone thought to file a lawsuit alleging that a proof of claim in bankruptcy had violated the Fair Debt Collection Practices Act.[14]

But the United States Court of Appeals for the Eleventh Circuit has tried to upend that consistent and reliable precedent,[15] with results that have confused the credit-and-collection industry, that have created an unnecessary conflict between two federal statutes and among the circuit courts of appeals, that will frustrate the Bankruptcy Code's purpose of giving debtors a fresh start, and that will unfairly impose liability on debt collectors for following a longstanding and consistent rule that multiple federal appellate courts have articulated.

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[13] *See* Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[14] *See Adair v. Sherman*, No. 98 C 3946, 1999 U.S. Dist. LEXIS 2534 (N.D. Ill. Mar. 1, 1999).

[15] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1262 (11th Cir. 2014) ("Just as LVNV would have violated the FDCPA by filing a lawsuit on stale claims in state court, LVNV violated the FDCPA by filing a stale claim in bankruptcy court.").

The Eleventh Circuit's holding in *Crawford v. LVNV Funding, LLC*,[16] called that longstanding and consistent interpretation into question, and has caused confusion in the credit-and-collection industry. Under the Eleventh Circuit's holding, a debt collector or a debt buyer may run afoul of the Fair Debt Collection Practices Act by doing nothing more than presenting a time-barred debt to a bankruptcy court for administration as part of a bankruptcy estate. As a result, at least in the Eleventh Circuit, debt collectors and buyers are less likely to present such debts in the bankruptcy process — with the result that the bankrupt debtor may not obtain the complete relief to which the debtor is otherwise entitled.

That result is unfair to the debt collectors and buyers — not only because it is substantively unfair, but because the law should not force those collectors and buyers (and their attorneys) into the Hobson's choice of either filing a proof of claim and facing liability under the Fair Debt Collection Practices Act, or being excluded from the bankruptcy process in order to avoid such liability. But that result can also be unhealthy for the debtor, in that it could prevent the resolution of unpaid debt that the debtor may want discharged for any number of reasons.

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[16] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

Every other federal circuit court of appeals that has considered this issue since *Crawford* has rejected the Eleventh Circuit's approach.[17] This Court should correct the Eleventh Circuit's frustrating and confusing error.

III. The Eleventh Circuit's approach imposes an unwarranted burden and risk on debt collectors acting in good faith.

A. Whether a debt is subject to a limitations defense is not necessarily a simple question that can always be easily answered.

Whether a debt is stale usually depends on simple facts, which the Rule 3001 disclosure elicits — but determining whether the debt is stale then requires the application of law to those facts. That determination is also simple in many cases — but not always.

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[17] *See Dubois v. Atlas Acquisitions LLC (In re Dubois)*, No. 15-1945, 2016 U.S. App. LEXIS 15682, at *16–23 (4th Cir. Aug. 25, 2016) ("We conclude that filing a proof of claim in a Chapter 13 bankruptcy based on a debt that is time-barred does not violate the FDCPA when the statute of limitations does not extinguish the debt."); *Owens v. LVNV Funding, LLC*, 832 F.3d 726, 735 (7th Cir. 2016) ("Like the Eighth Circuit, we decline to follow the Eleventh Circuit's approach."); *Nelson v. Midland Credit Mgmt., Inc.*, 828 F.3d 749, 752 (8th Cir. 2016) ("This court rejects extending the FDCPA to time-barred proofs of claim.").

Even in the simplest cases, determining whether a debt is subject to a limitations defense involves several basic questions:

- **What law applies?** Does the applicable agreement provide a choice of law? Or does the law of the place where the debtor entered into the agreement govern? Or the law of the forum where a lawsuit would be brought?
- **Under the governing law, what is the applicable statute of limitations?** There is more than one available answer in some jurisdictions. For example, Illinois has different limitations periods for "written" and "unwritten" agreements (and "written" and "unwritten" don't necessarily mean what they sound like — an "unwritten" agreement can mean a written agreement that isn't exhibited to the complaint in an action for collection).[18]
- **Has the statute of limitations been tolled? Has it been reset?**

One could teach an entire law-school course on the statute of limitations. Even in a simple case, there

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[18] *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 U.S. Dist. LEXIS 48722, at *6–8 (N.D. Ill. June 23, 2008).

are often questions over which reasonable minds can differ in good faith, hence the not-infrequent litigation over the statute of limitations.

State law governs a debt's enforceability, and statutes of limitations differ from state to state. For example, just within the three states in the Eleventh Circuit:

- The statute of limitations on a written contract is six years in Alabama[19] (ten years if the writing is under seal[20]) and Georgia[21] (but twenty years if the instrument is under seal[22]), but only four years in Florida.[23]
- The statute of limitations on an oral contract is six years in Alabama,[24] but four years in Florida[25] and Georgia.[26]
- The statute of limitations on a judgment is twenty years in

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[19] Ala. Code § 6-2-34(4).

[20] *Id.* § 6-2-33(1).

[21] Ga. Code § 9-3-24.

[22] *Id.* § 9-3-23.

[23] Fla. Stat. § 95.11(2)(b).

[24] Ala. Code § 6-2-34(9).

[25] Fla. Stat. § 95.11(3)(k).

[26] Ga. Code § 9-3-25.

Alabama[27] and Florida,[28] but seven years in Georgia.[29]

- The statute of limitations on an open account is three years in Alabama,[30] but neither Florida nor Georgia has a statute that applies to open accounts.

And even within a state, correctly categorizing a debt may expose a debt collector to error. For example, in one recent case involving collection of a credit-card debt, *Taylor v. First Resolution Investment Corp.*,[31] an Ohio state court "held that [Ohio's] borrowing statute did not apply, that Ohio law governed the determination of the statute of limitations, that Ohio law imposed either a 6- or 15-year statute of limitations," and that the collection lawsuit was timely under either limitation period.[32] But the appellate court reversed the trial court, holding that Delaware's three-year statute of limitations applied because

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[27] Ala. Code § 6-2-32.

[28] Fla. Stat. § 95.11(1).

[29] Ga. Code § 9-12-60(a)(1).

[30] Ala. Code § 6-2-37(1).

[31] *Taylor v. First Resolution Inv. Corp.*, 2016-Ohio-3444, 2016 Ohio LEXIS 1654 (Ohio June 16, 2016).

[32] *Id.*, 2016-Ohio-3444, ¶ 29, 2016 Ohio LEXIS 1654, at *18.

the issuing bank was located in Delaware.[33] The Ohio supreme court agreed with the intermediate appellate court, and held that the debt was time-barred — in a 184-paragraph analysis that included a majority opinion in which one justice concurred only in the judgment, a partial concurrence in which two justices joined,[34] and a dissent by the chief justice in which one other justice joined.[35]

The *Taylor* trial judge spotted the right issues but, according to the appellate courts, reached the wrong holding. The seven-justice supreme court couldn't say what the right holding was without writing three opinions, including a dissent. If those judges couldn't agree on what the correct result, how is a non-lawyer debt collector supposed to figure it out?

Some debt-collection firms are law firms, but many are not. And some debt collectors are licensed lawyers, but many are not. While a non-lawyer debt collector may be able to reach an informed view about whether a debt is subject to a limitations defense, that view may be mistaken in the absence of a more sophisticated legal analysis. To impose

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[33] *Id.*, 2016-Ohio-3444, ¶ 16, 2016 Ohio LEXIS 1654, at *12.

[34] *Id.*, 2016-Ohio-3444, ¶ 108, 2016 Ohio LEXIS 1654, at *63.

[35] *Id.*, 2016-Ohio-3444, ¶ 123, 2016 Ohio LEXIS 1654, at *71.

that burden, and the concomitant risk of liability, on debt collectors acting in good faith goes far beyond any duty that Congress imposed on debt collectors under the Fair Debt Collection Practices Act — and as this Court has reminded all debt collectors, a mistaken view of the law is not an excuse and may result in significant civil liability.[36] Rule 3001 established a new regime that substitutes disclosure for liability.

B. The Bankruptcy Rules require that a claimant provide information to determine whether a debt is stale, and compliance with that requirement should be enough (and should not result in potential liability).

Whether a debt is stale usually depends on simple facts. Federal Rule of Bankruptcy Procedure 3001 requires the disclosure, in "a statement . . .

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[36] *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 582–84 (2010) ("Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law. . . . Congress . . . did not confine liability under the FDCPA to 'willful' violations, a term more often understood in the civil context to excuse mistakes of law."). The *Jerman* Court left open the question of whether a mistake of state law, or of federal law other than the Fair Debt Collection Practices Act, could expose a debt collector to liability. *Id.* at 580 n4.

filed with the proof of claim," of the relevant facts from which a debt's timeliness can be ascertained:

> When a claim is based on an open-end or revolving consumer credit agreement — except one for which a security interest is claimed in the debtor's real property — a statement shall be filed with the proof of claim, including all of the following information that applies to the account:
>
> (i) the name of the entity from whom the creditor purchased the account;
>
> (ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;
>
> (iii) the date of an account holder's last transaction;
>
> (iv) the date of the last payment on the account; and
>
> (v) the date on which the account was charged to profit and loss.[37]

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[37] Fed. R. Bankr. P. 3001(c)(3)(A).

When this Court adopted that rule in 2011, the advisory committee specifically noted that "[d]isclosure of the information required by paragraph (3) will . . . provide a basis for assessing the timeliness of the claim."[38] Thus, the Bankruptcy Rules already require that a claimant provide information to determine whether a debt is stale. Compliance with that requirement — that is, truthfully furnishing all the information from which the debtor, the trustee, the bankruptcy court, and other creditors may "assess[] the timeliness of the claim" — should be enough to avoid liability for any alleged violation of the Fair Debt Collection Practices Act.[39]

IV. Discouraging the filing of potentially stale claims may deprive debtors of the "fresh start" that the Bankruptcy Code promises by preventing those claims from being discharged.

If a debt collector cannot file a proof of claim as to a stale debt without violating the Fair Debt Collection Practices Act, then fewer proofs of claim

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[38] *Id.* committees notes (2011 amend. II).

[39] *See B-Real, LLC v. Rogers*, 405 B.R. 428, 431 (M.D. La. 2009) ("It is difficult for this Court to understand how a procedure outlined by the Bankruptcy Code could possibly form the basis of a violation under the FDCPA.").

will be filed as to such debts.[10] The rule that the Eleventh Circuit has adopted will have certain foreseeable effects:

- A proof of claim will not be filed as to some debts because they are stale.
- Some debts that are stale will be kept out of bankruptcy.
- A proof of claim will not be filed as to some debts that are potentially but not actually stale, but where the debt collector decides that the risk of defending against a claim under the Fair Debt Collection Practices Act outweighs the benefit of presenting the claim in the bankruptcy.
- Some debts that are potentially but not actually stale will be kept out of bankruptcy.

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[10] *See MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 916 (9th Cir. 1996) ("The threat of later state litigation may well interfere with the filings of claims by creditors and with other necessary actions that they, and others, must or might take within the confines of the bankruptcy process. Whether creditors should be deterred, and when, is a matter unique to the flow of the bankruptcy process itself . . . ."); *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 U.S. Dist. LEXIS 6933, at *17 (N.D. Ill. Apr. 19, 1999) ("creditors may be deterred from filing claims").

These effects are especially problematic where the potentially time-barred debt is not, in fact, time-barred — that is, where the debt collector decides that the risk of taking a mistaken view of the law outweighs the risk of forgoing collection of a legitimate and fully collectible debt. That result is unfair to the debt collectors and to creditors.

But that result can also be unhealthy for the debtor, in that it could prevent the discharge of the unpaid debt that the debtor may have forgotten to include in his or her bankruptcy petition. Stale debt is, after all, *old* debt, and thus more likely to be overlooked or forgotten simply by virtue of that fact.[11] If the stale debt is not discharged, then it may still be subject to collection, because it was not included in the bankruptcy discharge. And if the debt is not actually stale, then it may still result in litigation against the debtor. In either case, the debtor will not have gotten the "fresh start" that the Bankruptcy Code promises:

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[11] *See Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014) (the "debtor's memory of a stale debt may have faded and personal records documenting the debt may have vanished"); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir Ill. 2013) (quoting *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) ("the passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt")).

> . . . application of the FDCPA to bankruptcy proofs of claim would undermine the central purpose of the Bankruptcy Code, namely, to adjudicate and conciliate all competing claims to a debtor's property in one forum and one proceeding. . . . Permitting debtors to premise FDCPA actions on proofs of claim filed in bankruptcy proceedings would give rise to two definite risks. The first is that creditors may be deterred from filing claims, thus defeating the point of bringing all claims together in one proceeding[]. . . . The second risk is that the possibility of an FDCPA claim, with its provisions permitting statutory and actual damages and attorney's fees, could prompt debtors to ignore the procedural safeguards within the Bankruptcy Code, such as the right to object to proofs of claim and to seek sanctions against creditors who violate provisions within the Bankruptcy Code, in favor of the FDCPA. . . . The practice of debtors deliberately bypassing the Bankruptcy Code's objection process in favor of

alternative litigation would undermine the entire bankruptcy system.[42]

An old debt that is not discharged in the bankruptcy — especially if the debt is not actually outside the statute of limitations — can also be unhealthy for the debtor, in that it could prevent the resolution of unpaid debt that the consumer may want to settle for any number of reasons. The omission of an old debt from the bankruptcy will also deprive the debtor of the benefits of a bankruptcy discharge, such as protection against discriminatory treatment based on the omitted debt.[43]

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[42] *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 U.S. Dist. LEXIS 6933, at *15–18 (N.D. Ill. Apr. 19, 1999).

[43] *See* 11 U.S.C. § 525 (protection against discriminatory treatment).

Conclusion

This Court should therefore reverse the Court of Appeals' judgment.

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Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is a Senior Research Scholar in Law at the Yale Law School, has served as an Adjunct Professor of Law at the Georgetown University Law Center and the New York University School of Law, and is a frequent Visiting Lecturer in Law at the Yale Law School. He has also taught at the Harvard Law School. Among other subjects, he teaches courses on bankruptcy law, domestic and international business reorganizations, commercial transactions, secured transactions, and the federal courts. In addition to his teaching, the undersigned is a contributing author of Collier on Bankruptcy, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Petitioner and Respondent have filed with the Court letters consenting to the filing of *amicus curiae* briefs in support of either or neither party.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, 560 U.S. 770 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Central Virginia Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court several amicus briefs in bankruptcy cases, including *Husky International Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016); *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015); *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015); *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Clark v.*

Rameker, 134 S. Ct. 2242 (2014); *Law v. Siegel*, 134 S. Ct. 1188 (2014); *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012); *Hall v. United States*, 132 S. Ct. 1882 (2012); *Ransom v. FIA Card Servs.*, 131 S. Ct. 716 (2011); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Howard Delivery Serv., Inc. v. Zurich American Ins. Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The purpose of this brief is to address matters that bear on this Court's determination of two important issues that affect the protections afforded to debtors in bankruptcy from fraudulent and exploitative conduct: (1) whether a creditor who qualifies as a "debt collector" under the Fair Debt Collection Practices Act ("FDCPA") violates that Act by knowingly and intentionally filing a proof of claim in bankruptcy on a time-barred debt; and (2) if such conduct does fall within the scope of the FDCPA, whether Congress clearly and manifestly intended the Bankruptcy Code to preclude application of the FDCPA to the filing of proofs of claim.

As to the first issue, the knowing and intentional filing of a proof of claim on a time-barred debt is a violation of the FDCPA. As the Elev-

enth Circuit noted in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015), consumer debt buyers like petitioner in this case have filed a "deluge" of stale proofs of claim in consumer bankruptcy cases in the hope of collecting on some percentage of them. The filing of these stale claims represent attempts by debt collectors to mislead debtors into the belief that the relevant debts are legally valid when the collectors know they are unenforceable. In addition, they represent illicit efforts to play off of the presumptive good faith of most creditors who file legitimate proofs of claim on enforceable obligations. As this brief explains, courts have widely held that lawsuits seeking to enforce stale claims violate the FDCPA when the creditors know the claims are unenforceable, and proofs of claim filed on the same stale debts are fundamentally no different.

On the second issue, this brief further explains that the plain language of the FDCPA makes clear that it applies to proofs of claim, and nothing in the Bankruptcy Code makes an exception to the FDCPA in this context. This Court has made clear that it will not construe a statute as being implicitly repealed by a later statute unless Congress's intent to do so is "clear and manifest." This high burden cannot be met in this instance.

STATEMENT

Petitioner Midland Funding, LLC ("Midland") is in the business of purchasing and seeking to collect unpaid debts. Pet. App. 3a. Midland purchased a debt that Respondent Aleida Johnson ("Johnson") at one point owed to Fingerhut Credit Advantage. *Id.* The date of the last transaction on Johnson's account with Fingerhut was in May of 2003. *Id.*

Johnson filed a Chapter 13 bankruptcy petition in March of 2014. *Id.* In May of 2014, Midland filed a proof of claim in Johnson's bankruptcy case, seeking to collect $1,879.71 on the debt purchased from Fingerhut. *Id.* Midland's claim is governed by Alabama law, which imposes a six-year statute of limitations on claims to collect on an overdue debt, and therefore under Alabama law the claim is time-barred. *Id.*

Johnson commenced an action against Midland in the United States District Court for the District of Alabama, alleging that Midland's time-barred attempt to collect on the overdue debt was a violation of the Fair Debt Collection Practices Act ("FDCPA"). Pet. App. 18a-19a. The FDCPA prohibits a "debt collector" from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "false[ly] represent[ing] . . . the character, amount, or legal status of any debt." 15 U.S.C. § 1692e. The FDCPA

further prohibits a debt collector from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," including collecting any amount that is not "expressly authorized by the agreement creating the debt or permitted by law." *Id.* § 1692f. A "debt collector" under the statute is "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another." *Id.* § 1692a.

Midland moved to dismiss Johnson's claim. Pet. App. 18a. The District Court recognized that it was bound by the Eleventh Circuit's decision in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015), that filing a proof of claim in bankruptcy to collect a time-barred debt is a violation of the FDCPA. Pet. App. 19a. Nevertheless, the court held that the FDCPA prohibition on filing stale proofs of claim is in "irreconcilable conflict" with section 501(a) of the Bankruptcy Code, which provides in permissive terms that "[a] creditor . . . may file a proof of claim." 11 U.S.C. § 501(a). The court held that where, as is the case under Alabama law, a statute of limitations period only extinguishes a creditor's remedy but not the underlying right to payment, a creditor has the right to file a proof of claim on a time-barred debt under section 501. Pet. App. 22a. The court then found that this right is in conflict with the FDCPA because a creditor may

comply with the FDCPA only by "surrendering its right under the Code to file a proof of claim on a time-barred debt." Pet. App. 33a. Because the Bankruptcy Code was enacted after the FDCPA, the court held that the former impliedly repealed the latter. Pet. App. 31a, 37a.

On appeal, the Eleventh Circuit reversed. The court first noted that it had faced a "nearly identical" question in *Crawford* and confirmed its decision in that case that filing a stale proof of claim in bankruptcy constitutes a violation of the FDCPA. Pet. App. 5a. The Eleventh Circuit also disagreed with the lower court's conclusion that the FDCPA and the Bankruptcy Code conflicted irreconcilably. Pet. App. 7a. The court held that the FDCPA and the Bankruptcy Code "differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist." Pet. App. 11a. The Bankruptcy Code allows—but does not require—all creditors to file proofs of claim, while the FDCPA prohibits those creditors that qualify as "debt collectors" from filing stale proofs of claim. Pet. App. 12a, 14a. Reasoning that the Bankruptcy Code's filing rules "do not shield debt collectors from the obligations that Congress imposed on them," the Eleventh Circuit concluded that a debt collector that chooses to file a time-barred proof of claim "is simply opening himself up to a potential lawsuit for an FDCPA violation." Pet. App. 13a-14a.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit correctly held that Midland violated the FDCPA by filing a proof of claim for a time-barred debt in Johnson's bankruptcy proceeding and that the Bankruptcy Code did not implicitly repeal the FDCPA as to proofs of claim filed in bankruptcy. Federal courts have widely recognized that filing or threatening to file a lawsuit to collect a debt that is barred by the applicable statute of limitations is a violation of the FDCPA. *See, e.g., Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). A proof of claim filed in a bankruptcy proceeding is the equivalent of a lawsuit to collect a debt and, like a separately filed lawsuit, filing a proof of claim for a time-barred debt is an act to collect a debt "which the debt collector knows or should know is unavailable or unwinnable" and "is the kind of abusive practice the FDCPA was intended to eliminate." *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 876 (N.D. Ill. 2009) (citation and quotation marks omitted). Midland's attempts to distinguish the two scenarios fall short, and the decision below holding that the filing of a stale proof of claim violates the FDCPA should be affirmed.

Furthermore, the Bankruptcy Code in no way precludes application of the FDCPA to stale proofs of claim. The starting point for all statutory interpretation is the text of the statute itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526,

534 (2004). On its face, the FDCPA prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, and from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," *id.* § 1692f. There is no exception in these provisions for debt collectors acting within a bankruptcy proceeding, and the statute therefore clearly applies to misleading, unfair, or unconscionable attempts to collect a debt through a proof of claim. Further, nothing in the Bankruptcy Code excepts application of the FDCPA to a debt collector filing a proof of claim, and the provisions are not "irreconcilably conflicted" such that this Court should infer repeal of the FDCPA by the Code. Moreover, it is a cardinal rule of statutory construction that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (citation and quotation marks omitted). Here there is no evidence that Congress intended the Code to repeal the FDCPA in this setting, let alone evidence sufficient to satisfy the "clear and manifest" standard. Where, as here, two statutes may coexist and the requisite intent to infer repeal does not exist, the courts must regard both provisions as effective. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001).

The Eleventh Circuit properly did so, and this Court should affirm.

ARGUMENT

I. Knowingly Filing A Proof Of Claim For A Time-Barred Debt Is A Violation Of The FDCPA.

A. Filing a Proof of Claim is an Act to Collect a Debt Analogous to Filing a Traditional Debt-Collection Lawsuit.

Federal courts have widely held that filing or threatening to file a lawsuit to collect a time-barred debt is a violation of the FDCPA. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); *accord Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 399-400 (6th Cir. 2015) (letter offering settlement of time-barred claim was a violation of FDCPA because "consumers might still be confused about the enforceability of a debt"); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011) (recognizing that threatened or actual litigation on a time-barred debt is a violation of the FDCPA, but finding no threat of litigation); *Castro v. Collecto, Inc.*, 634 F.3d 779, 783 (5th Cir. 2011) (recognizing that "threatening to sue on time-barred debt may well constitute a violation of the FDCPA," but finding that claim was not time-barred); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) (same as

Huertas).[2] As one court has explained, "bringing or threatening to bring a lawsuit 'which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate.'" *Herkert*, 655 F. Supp. 2d at 876 (quoting *Ramirez v. Palisades Collection LLC*, No. 07-3840, 2008 WL 2512679, at *5 (N.D. Ill. June 23, 2008)); *see also Beattie*, 754 F. Supp. at 393 ("[T]he [FDCPA] was designed to prevent debt collectors from threatening suit against persons whom the collector knows or should know are not legally liable for a debt."). As these decisions recognize, a lawsuit premised or threatened on the basis of a stale claim is an abuse of the litigation system. A proof of claim premised on the basis of a stale claim is fundamentally no different.

In all material respects, the act of filing a proof of claim in a bankruptcy case is the func-

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[2] *See also Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 875 (N.D. Ill. 2009); *Larsen v. JBC Legal Grp., P.C.*, 533 F. Supp. 2d 290, 302 (E.D.N.Y. 2008); *Goins v. JBC & Assocs., P.C.*, 352 F. Supp. 2d 262, 272 (D. Conn. 2005); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393 (D. Del. 1991); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

tional equivalent of commencing litigation to collect a debt outside the bankruptcy process. To begin with, a debtor commences a court-supervised bankruptcy case by filing a bankruptcy petition. 11 U.S.C. § 301. In turn, the filing of the petition triggers the automatic stay, which generally bars creditors from pursuing debt-collection activity outside the bankruptcy process. 11 U.S.C. § 362.

In lieu of pursuing immediate litigation outside the bankruptcy process, creditors may, but are not required to, file proofs of claim setting forth the debts they assert they are owed. 11 U.S.C. § 501(a). The point is to give creditors who are stayed from pursuing legitimate debt-collection activity outside the bankruptcy system an opportunity to assert legitimate claims through the proof of claim procedure. In other words, the point is to provide a means for the creditor to be paid something on its claim, a classic debt-collection activity. In the event a creditor invokes the bankruptcy debt-collection procedure improperly by filing a proof of claim seeking to collect an unenforceable debt, the Code clearly provides that such claims must be disallowed. 11 U.S.C. § 502(b)(1). And the fact that such claims must be disallowed under section 502 dramatically undercuts any notion that it is somehow legitimate for creditors to file such claims in the first instance.

Although the proof of claim process acts generally as a non-bankruptcy litigation substitute, the filing of a proof of claim can easily morph into formal debt-collection litigation, either within or outside the bankruptcy court. For example, where a creditor has filed a proof of claim, relief from stay may be granted so that the claim may be liquidated in a traditional litigation forum, leaving only the consideration of unique aspects of bankruptcy law to be adjudicated in the bankruptcy court. *See, e.g., Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 91 (3d Cir. 1997) (allowing relief from stay to "expedite the resolution of [the state tort] claim by eliminating it if [the debtor] prevails on appeal, or by rendering it final and nondischargeable if [the plaintiff] prevails"); *In re Chacon*, 438 B.R. 725, 736 (Bankr. D. N.M. 2010) ("A number of courts have . . . come up with the same solution: permit the liability and damages issues to be determined either in the state court or the U.S. district court, and then have the parties return to the bankruptcy court as needed for an adjudication of the dischargeability issue."); *In re Cummings*, 221 B.R. 814, 819 n.9 (Bankr. N.D. Ala. 1998) ("Numerous courts have determined that, under appropriate circumstances, a bankruptcy court may grant relief from the stay to allow a debt to be liquidated in a pending state court proceeding, and then make a determination of dischargeability based on the state court record."). In such circumstances where relief from stay has been granted

and the creditor pursues a time-barred lawsuit against the debtor, the creditor's claim would obviously be subject to any statute of limitations defense, and the pursuit of the litigation itself may well violate the FDCPA under the precedents discussed above. *See, e.g., Phillips*, 736 F.3d at 1079; *Kimber*, 668 F. Supp. at 1487 (finding an FDCPA violation because "time-barred lawsuits are, absent tolling, unjust and unfair as a matter of public policy").

Alternatively, creditors may file proofs of claim and have their claims adjudicated entirely in the bankruptcy court. Once again, such proofs of claim are likewise subject to any available statute of limitations defense and, if time-barred, must be disallowed as unenforceable under section 502 of the Bankruptcy Code. 11 U.S.C. § 502(b)(1). The question is whether, for purposes of the FDCPA, debt-collection activity involving the filing of a proof of claim should be viewed differently from the very non-bankruptcy debt-collection activity that the proof of claim process substitutes for and closely tracks. The answer is that, for purposes of the FDCPA, there is simply no basis for treating them differently.

To begin with, just like a debt collector who threatens or commences a traditional lawsuit on a debt he knows is stale, a debt collector who knowingly files a proof of claim for a time-barred debt is plainly seeking to collect a debt that the

collector "knows or should know is unavailable or unwinnable by reason of a legal bar." *Herkert*, 655 F. Supp. 2d at 876 (citation and quotation marks omitted). Such conduct is precisely "the kind of abusive practice the FDCPA was intended to eliminate." *Id.*; *see also Beattie*, 754 F. Supp. at 393. Thus, a debt collector's filing of a proof of claim on a debt he knows is time-barred is similarly "unjust and unfair as a matter of public policy" and violates the FDCPA for the same reasons applicable to a traditional debt-collection lawsuit. *Kimber*, 668 F. Supp. at 1487; *see also McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) ("Whether a debt is legally enforceable is a central fact about the character and legal status of that debt. A misrepresentation about that fact thus violates the FDCPA.").

The parallel between a proof of claim and a traditional debt-collection lawsuit is even more apparent in the scenario in which a debtor in bankruptcy objects to a proof of claim and files a counterclaim. A claim combined with an objection and counterclaim gives rise to an "adversary proceeding" under the Bankruptcy Rules, which is just the bankruptcy term for what amounts to a traditional lawsuit commenced by a summons and complaint. *See* FED. R. BANKR. P. 3007(b); FED. R. BANKR. P. 7001 (defining adversary proceedings); *see also, e.g., Mulvania v. United States (In re Mulvania)*, 214 B.R. 1, 7 (B.A.P. 9th

Cir. 1997) (objection to claim joined with request to determine validity of lien is an adversary proceeding).

Notably, an adversary proceeding is a separate piece of litigation from the overarching bankruptcy case and in large part mirrors litigation that occurs outside the bankruptcy context. *See, e.g., Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 457 (2004) (Thomas, J., dissenting) ("The similarities between adversary proceedings in bankruptcy and federal civil litigation are striking."); *Estancias La Ponderosa Dev. Corp. v. Harrington (In re Harrington)*, 992 F.2d 3, 6 n.3 (1st Cir. 1993) (noting "[t]he great similarity between an adversary proceeding in bankruptcy and an ordinary civil action"). The Bankruptcy Rules incorporate the Federal Rules of Civil Procedure in adversary proceedings, making discovery and pretrial procedure in an adversary proceeding largely identical to that in traditional civil litigation. *See* FED. R. BANKR. P. 7016 (adopting FED. R. CIV. P. 16 regarding pretrial conferences); FED. R. BANKR. P. 7026-7037 (adopting discovery rules in FED. R. CIV. P. 26 to 37). Post-trial procedures to alter or amend a judgment or move for a new trial are also the same in an adversary proceeding as in civil litigation. FED. R. BANKR. P. 7052, 9023, 9024. The filing of a proof of claim, therefore, can easily give rise to a distinct piece of litigation virtually indistinguishable from ordinary civil litigation. Because of these similarities, it would be illogical

to recognize the applicability of the FDCPA with respect to debt-collection activity involving an ordinary lawsuit but not debt-collection activity involving a proof of claim.

B. Midland's Proffered Reasons to Preclude Application of the FDCPA to Proofs of Claim are Equally Applicable to, and Have Long Been Rejected in the Context of, Traditional Debt-Collection Lawsuits.

In spite of the similarities between the filing of a proof of claim on a stale debt and a traditional lawsuit premised on the same stale debt, Midland nonetheless insists that the filing of a proof of claim cannot be a violation of the FDCPA because "[d]ebt recovery within bankruptcy is fundamentally different from debt collection outside bankruptcy." Pet. Br. 34. None of the "differences" that Midland identifies, however, justify creating an exception under the FDCPA for the filing of proofs of claim on debts that are known to be stale.

According to Midland, "debtors in bankruptcy are protected by a panoply of procedures," including the assignment of a trustee (and often counsel) to object to claims, regulations governing the content of proofs of claim and the procedures for administering them, and sanctions for abusive conduct. Pet. App. 31-32. But similar protections exist for debtors outside of bankruptcy. And just as none of these protections excuse

application of the FDCPA in traditional litigation, the protections Midland identifies do not excuse the application of the FDCPA to debt-collection activity involving a proof of claim.

For example, under both state and federal law, traditional complaints must meet all applicable pleading standards or risk dismissal. *See, e.g.*, FED. R. CIV. P. 8(a)(2) (a complaint must include a "short and plain statement of the claim showing that the pleader is entitled to relief"); ALA. R. CIV. P. 8(a) (same); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissing a complaint that did not provide "enough facts to state a claim to relief that is plausible on its face"). Moreover, where counsel are involved, they must certify that the relevant pleadings are true and well-founded. For example, an attorney signing a pleading in federal court certifies that a reasonable inquiry has been made regarding the truth of the factual allegations contained therein, the claims are warranted, and the pleading is not motivated by an improper purpose. FED. R. CIV. P. 11; *see also, e.g.*, ALA. R. CIV. P. 11. Under these standards, knowingly filing a time-barred lawsuit has been held to be sanctionable conduct. *See Kimber*, 668 F. Supp. at 1488 (citing cases). But that does not mean that the FDCPA also does not apply.

By the same token, the mere fact that certain bankruptcy procedures may also shield a debtor

from certain kinds of harm arising from illegitimate proofs of claim is not sufficient reason to excuse application of the FDCPA, which has its own focus and remedial scope. The relevant inquiry in determining if a debt-collection action violates the FDCPA is whether a debt collector's conduct is misleading or deceptive, not whether other potential safeguards are in place to further combat abuses. *See, e.g., Freyermuth*, 248 F.3d at 771 ("The case law on this issue focuses on the debt collector's actions, and whether an unsophisticated consumer would be harassed, misled or deceived by them.").

Midland also contends that the FDCPA does not apply to proofs of claim premised on time-barred debts because a creditor has the right under the Bankruptcy Code to file a proof of claim and the debtor may always raise any applicable statute of limitations as a defense. Pet. Br. 18-19. But the same thing can be said of traditional debt-collection litigation: the creditor has the right to file a complaint and the debtor may raise any applicable statute of limitations as a defense. *See Goins*, 352 F. Supp. 2d at 272. Notably, courts have consistently rejected this argument as a reason to avoid application of the FDCPA to time-barred lawsuits. *Id.* (although statute of limitations is an affirmative defense that can be waived, it is "a complete defense" and "the threat to bring a suit under such circumstances can at best be described as a 'misleading'

representation"); *Kimber*, 668 F. Supp. at 1488 (rejecting assertion that "because a statute of limitations is an affirmative defense which is waived if not raised, a plaintiff may not be penalized for knowingly filing a time-barred suit"). The same reasoning applies to proofs of claim.

II. The FDCPA Covers Proofs Of Claim Premised on Stale Debts Filed In Bankruptcy Proceedings.

A. The Plain Meaning of the FDCPA Compels its Application in the Claims Process.

In construing and applying a statute, "[t]he starting point . . . is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)); *see also United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [the statutory provision at issue] begins where all such inquiries must begin: with the language of the statute itself."). In addition, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and quotation marks omitted); *see also Rake v. Wade*, 508 U.S. 464, 471 (1993); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). That is because a cardinal

presumption is that Congress "says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 254. Similarly, courts must also generally refrain from engrafting limitations on statutory provisions that do not appear in its text. *See, e.g., Lamie*, 540 U.S. at 538.

On its face, the FDCPA prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "false[ly] represent[ing] . . . the character, amount, or legal status of any debt," 15 U.S.C. § 1692e. The FDCPA also prohibits a debt collector from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," including collecting any amount that is not "expressly authorized by the agreement creating the debt or permitted by law." *Id.* § 1692f. There is no exception in the statute for filing proofs of claim in a bankruptcy proceeding. Rather, the FDCPA provides its own protections by expressly applying only to creditors that qualify as "debt collectors" and allowing a safe harbor for those debt collectors whose violations are "not intentional and resulted from a bona fide error." *Id.* § 1692k(c).

A debt collector who knowingly attempts to collect a claim by filing a proof of claim premised on a time-barred debt violates the FDCPA no less than a debt collector who knowingly threat-

ens to file or files a traditional lawsuit premised on the same time-barred debt. Both acts fall squarely within the plain terms and remedial scope of the FDCPA, and this Court should enforce the statute according to its plain terms. *Hartford Underwriters*, 530 U.S. at 6. To read into the statute an exception for proofs of claim filed with a bankruptcy court would improperly apply a limitation to the statute that simply does not exist. *See Lamie*, 540 U.S. at 538.

B. Nothing in the Bankruptcy Code Prevents the Application of the FDCPA to a Proof of Claim for a Time-Barred Debt.

The Bankruptcy Code does not supply the full universe of laws and rules that govern the conduct of bankruptcy proceedings. *See, e.g.*, 28 U.S.C. § 959(b) (requiring any trustee, receiver, or debtor in possession to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated"); *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Prot.*, 474 U.S. 494, 507 (1986) (finding that "[t]he Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety" as required by state law). Although it is certainly true that provisions such as the automatic stay proscribe certain conduct, it is equally true that Congress did not intend for

parties in bankruptcy "to have *carte blanche* to ignore nonbankruptcy law." *Id.* at 502.

Section 501 of the Bankruptcy Code provides that "a creditor . . . *may* file a proof of claim." 11 U.S.C. § 501(a) (emphasis added). This provision is permissive, not mandatory. In comparison, the FDCPA prohibits a "debt collector" from using "any false, deceptive, or misleading representation" or "unfair or unconscionable means" to collect a debt, 15 U.S.C. §§ 1692e, 1692f, unless the debt collector can show by a preponderance of the evidence that its FDCPA violation "was not intentional and resulted from a bona fide error," *id.* § 1692k(c). Nothing in section 501 creates an exception to the FDCPA for creditors filing proofs of claim in bankruptcy proceedings or suspends the operation of the FDCPA in the bankruptcy context. As this Court has stated, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari,* 417 U.S. 535, 551 (1974).

As there is nothing in the language of section 501 that negates application of the FDCPA to debt collectors who file proofs of claim that are "false, deceptive, or misleading" or "unfair or unconscionable," application of the FDCPA should continue in the absence of a clearly stated

congressional expression to the contrary. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) ("It will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed."); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) (party contending Congress changed settled law has burden of showing intent). There is no such expression in section 501 (or anywhere else in the Bankruptcy Code), and this Court should accordingly conclude that both laws are effective.

C. The Enactment of the Bankruptcy Code Did Not Impliedly Repeal the FDCPA as it Applies to Proofs of Claim.

A cardinal rule of statutory construction that has often been repeated by this Court is that repeals by implication are not favored and will not be found unless the congressional intent to repeal is "clear and manifest." *Red Rock v. Henry*, 106 U.S. 596, 602 (1883); *accord Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). The party urging repeal "bears a heavy burden of persuasion" in establishing such intent, *Amell v. United States*, 384 U.S. 158, 165 (1966), and this Court has stated repeatedly that "repeals by implication are not favored." *Nat'l Ass'n of Home*

Builders, 551 U.S. at 662 (citation and quotation marks omitted); *see also Branch v. Smith*, 538 U.S. 254, 273 (2003); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). This Court has made clear that it "will not infer a statutory repeal unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662 (alterations in original) (citations and quotation marks omitted).

This Court has identified two specific situations in which repeal by implication may occur: "where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch*, 538 U.S. at 273 (quoting *Posadas*, 296 U.S. at 503). Midland does not claim that section 501 of the Bankruptcy Code covers the whole subject of, or is clearly intended to substitute for, the FDCPA. Midland's sole contention is that the statutes "irreconcilably conflict" and that the FDCPA must yield to the later-enacted Bankruptcy Code. *See* Pet. Br. 43-44.

Irreconcilability may be found only where it is "impossible for both provisions under consideration to stand." *Wilmot v. Mudge*, 103 U.S. 217, 221 (1880); *see also Morton*, 417 U.S. at 550 (no implied repeal where the statutes in question "can readily co-exist"). Under this stringent standard, courts may find irreconcilable conflict only where there is "a clear repugnancy between the old law and the new." *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 457 (1945), *reh'g denied*, 324 U.S. 890 (1945); *accord Tennessee Valley Auth.*, 437 U.S. at 190. Where a party advocating for repeal fails to meet the heavy burden of demonstrating that two statutes cannot, under any circumstances, be reconciled, courts must apply both provisions. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (quoting *Morton*, 471 U.S. at 551)); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem.").

Under its longstanding precedents, this Court should not infer repeal of the FDCPA as to proofs of claim filed in bankruptcy unless such a inference "is absolutely necessary . . . in order that

the words of the [Bankruptcy Code] shall have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662. Midland, of course, cannot meet the heavy burden of showing such a necessity exists because the Bankruptcy Code simply does not prohibit what the FDCPA directs. Once again, section 501 merely provides that "a creditor . . . *may* file a proof of claim." 11 U.S.C. § 501(a) (emphasis added). In contrast, the FDCPA prohibits a "debt collector" from using "any false, deceptive, or misleading representation" or "unfair or unconscionable means" to collect a debt. 15 U.S.C. §§ 1692e, 1692f. A "debt collector" is defined as "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another." *Id.* § 1692a. Thus, while creditors generally are permitted to file proofs of claim in a debtor's bankruptcy proceeding, the select creditors who also qualify as "debt collectors" violate the FDCPA by knowingly and intentionally choosing to file a proof of claim on a time-barred debt.

Debt collectors can easily comply with both the Bankruptcy Code and the FDCPA, and it is therefore in no way "impossible for both provisions . . . to stand." *Wilmot*, 103 U.S. at 221. A debt collector is free to choose to file only proofs of claim that do not violate the FDCPA. The two provisions clearly "are capable of coexistence,"

and it therefore "is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc.*, 534 U.S. at 143-44.

But even if the FDCPA and the Bankruptcy Code could be said to "irreconcilably conflict" in some sense, repeal by implication is still not appropriate unless the legislature's intent to cause such a result is "clear and manifest." *Posadas*, 296 U.S. at 503; *see also Nat'l Ass'n of Home Builders*, 551 U.S. at 662; *Rodriguez*, 480 U.S. at 524. As the court below acknowledged, and Midland does not dispute, there was no "clear and manifest" Congressional intent to repeal the FDCPA with the enactment of the Bankruptcy Code. Pet. App. 14a ("Congress never expressed a 'clear and manifest' intent to repeal the protections of the FDCPA when it enacted the Bankruptcy Code only a year later."). In fact, Midland essentially concedes that the burden of establishing "clear and manifest" intent is not met here, but claims that because the conflict "has arisen through judicial interpretation, Congress had no reason specifically to address that application [of the FDCPA] when it enacted the Bankruptcy Code," and that addressing the conflict at that time in fact "would have required an act of clairvoyance." Pet. Br. 43. In support of this assertion, Midland cites *United States v. Fausto*, 484 U.S. 439 (1988), but that case in no way excuses the requirement of "clear and manifest" intent to

infer a statute's repeal. In *Fausto*, the Court held that the Civil Service Reform Act ("CSRA"), under which certain employees have no administrative or judicial review of adverse personnel actions, precluded such employees from seeking judicial review of a personnel action based on the Back Pay Act. *Id.* at 447. While the Court held that there was no need for an "express statement" of repeal, *id.* at 453, the Court found ample support in the purpose behind the CSRA and the language of the act as a whole to conclude that Congress intended to preempt application of the Back Pay Act to personnel actions governed by the CSRA. *See id.* at 447 ("In the context of the entire statutory scheme, we think it displays a clear congressional intent to deny the excluded employees the protections of Chapter 75—including judicial review—for personnel action covered by that chapter."). No similar indicia of intent are present with respect to the relevant statutes here, and Midland simply cannot circumvent the well-established criteria that clear and manifest intent must exist for the Court to find an implied repeal. *See, e.g., Morton*, 417 U.S. at 550 (declining to find implied repeal where "nothing in the legislative history . . . indicates affirmatively any congressional intent to repeal").

CONCLUSION

For the foregoing reasons, as well as those briefed by Respondent, the decision of the court below should be affirmed.

Respectfully submitted,

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RECORD
AND
BRIEFS

Supreme Court, U.S.

No. 16-348

IN THE

Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner.

v.

ALEIDA JOHNSON,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Alane A. Becket et al., *Filer Beware! It's Not Just the Rules Committee Changing the Rules*, Norton Bankr. L. Adviser, Sept. 2014 33

Matthew R. Bremner, Note, *The Need for Reform in the Age of Financial Chaos*, 76 Brook. L. Rev. 1553 (2011) 30

Tanta Caraman & Thomas C. Kearns, Executive Office for United States Trustees, *Chapter 13 Disbursement Statistics and the Impact of Case Filing Trends* (2013) 9

Terry Carter, *Payback: Lawyers on Both Sides of Collection Are Feeling Debt's Sting*, 96 A.B.A. J., Dec. 2010 29

Consumer Finance Protection Bureau, *Fair Debt Collection Practices Act* (Annual Report 2016) 7, 8

JPMorgan Chase & Co., *Annual Report 2015* 8

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

In the decision below, the Eleventh Circuit held that certain bankruptcy creditors are subject to liability under the Fair Debt Collection Practices Act ("FDCPA") for filing proofs of claim on time-barred debts in *full* compliance with the Bankruptcy Code and Rules. That result comes as a rude and expensive surprise to bankruptcy creditors, who have long and correctly understood that the Bankruptcy Code expressly authorizes such claims (as the Court of Appeals conceded). Pet. App. 7a. The Eleventh Circuit's ruling, however, misinterprets both the FDCPA and the Bankruptcy Code, needlessly pitting one statute

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

against the other and causing untold damage to the bankruptcy system.

Critically, the Eleventh Circuit's ruling sweeps far more broadly than the purportedly "narrow range of actors and claims" identified by the decision below. Pet. App. 10a. As a result, the Eleventh Circuit's decision—if left unchecked—will subject a broad range of bankruptcy participants such as major banks and bankruptcy lawyers to liability under conflicting legal standards. It will also harm the very debtors the FDCPA was designed to protect, generate a number of additional conflicts between the FDCPA and the Bankruptcy Code, and spur a rash of litigation that seeks not to remedy any actual harm to debtors but instead to benefit the FDCPA bar.

Amicus therefore respectfully urges this Court to overturn the judgment below, and confirm that there can be no FDCPA liability for filing a truthful—if potentially unenforceable—proof of claim in bankruptcy.

SUMMARY OF ARGUMENT

I. The Eleventh Circuit's reading of the FDCPA and the Bankruptcy Code was premised in large part on the erroneous view that its decision would affect only a "narrow subset" of Chapter 13 creditors defined as "debt collectors" under 15 U.S.C. § 1692a(6). Pet. App. 9a. But in fact, the court's extension of the FDCPA threatens a broad range of bankruptcy participants with liability for filing accurate proofs of claim—actions the decision below repeatedly conceded are expressly authorized by the Bankruptcy Code. Pet. App. 7a, 8a, 9a, 12a. Some courts and administrative agencies have broadly interpreted the

term "debt collector" to cover far more than prototypical debt-collection companies. For example, "debt collectors" has been construed to encompass (i) major banks that regularly buy defaulted mortgage loans, and (ii) attorneys regularly involved in consumer debt litigation.

The consequences of affirmance in this case thus would sweep far more widely than the Court of Appeals posited. By subjecting mortgage creditors and bankruptcy attorneys—some of Chapter 13's most common and active participants—to the risk of FDCPA liability, the Eleventh Circuit's approach could severely distort a substantial portion of Chapter 13 bankruptcy proceedings.

II. The ruling below, if allowed to stand, would also ensure that bankruptcy creditors covered (or arguably covered) by the FDCPA will be forced to make complex legal judgments involving uncertain questions of state law prior to filing a proof of claim. The Eleventh Circuit failed to recognize the complexities involved in determining whether a debt is time-barred. And although the Court of Appeals suggested that creditors could take advantage of the FDCPA's bona fide error provision, 15 U.S.C. § 1692k(c), a patchwork of conflicting decisions by the lower courts means that creditors will often be subject to FDCPA liability for good faith yet ultimately erroneous interpretations of state law.

The obvious, and troubling, result is that many bankruptcy creditors will forfeit their rights to file proofs of claim on even arguably time-barred debts. That outcome will not benefit most debtors. In the vast majority of personal bankruptcy cases, the

amount that debtors pay into their bankruptcy plans "is *unaffected* by the number of unsecured claims that are filed." *In re Dubois*, 834 F.3d 522, 531-32 (4th Cir. 2016) (emphasis added). In fact, deterring creditors from filing proofs of claim on potentially time-barred debts will actually undercut the FDCPA's goal of protecting debtors. When proofs of claim on unscheduled debts are not submitted, the debt is not consolidated with other claims and is not discharged, leaving debtors subject to lawful collection activity and—if the debt turns out not to be time-barred—even lawsuits after they emerge from bankruptcy.

The counterproductive effects of applying the FDCPA in bankruptcy confirm what this Court recognized in *Kokoszka v. Belford*: Statutes like the FDCPA are designed to help prevent, not to regulate, bankruptcy. *See* 417 U.S. 642, 650-51 (1974). Once a debtor declares personal bankruptcy, he is protected by the existing structural safeguards under the Bankruptcy Code. Layering FDCPA liability over those protections will result in significant numbers of claims being left out of bankruptcy proceedings—thwarting the bankruptcy system's goal of collective treatment of claims, and depriving debtors of the fresh start offered by the Bankruptcy Code.

III. The decision below also creates a number of conflicts between the FDCPA and the Bankruptcy Code. Most obvious is the Eleventh Circuit's imposition of liability under the FDCPA for the exercise of a "right" created by the Bankruptcy Code. Pet. App. 8a. In addition, by defining a proof of claim in bankruptcy as an action to collect a claim against the debtor, the decision places the Bankruptcy Code's automatic stay provision (which prohibits attempts to collect a debt

against a debtor in bankruptcy) directly at odds with the Code's express approval of proofs of claim. The FDCPA's detailed notice and dispute provisions are also likely triggered by the Eleventh Circuit's extension of FDCPA liability into bankruptcy, causing additional conflicts with the claims adjudication process and spawning confusion for creditors and debtors alike. These conflicts further demonstrate that the FDCPA has no application in the context of personal bankruptcy.

IV. Finally, imposing FDCPA liability for the filing of accurate proofs of claim in bankruptcy would exacerbate the already booming business of FDCPA litigation. Taking advantage of the Act's complexity and its generous remedial provisions, many debtors' attorneys have formed practices that revolve entirely around suing debt collectors, often for good faith, technical violations of the FDCPA. The data regarding this cottage industry is staggering: FDCPA litigation in federal courts has seen a nearly nine-fold increase over the past fifteen years, and just a few attorneys in the entire country are responsible for a significant portion of this litigation explosion. If this Court were to affirm the Eleventh Circuit's extension of the FDCPA, it would magnify the current problem by giving rise to an untold number of new FDCPA suits nationwide predicated on the filing of legitimate proofs of claim in bankruptcy.

ARGUMENT

I. THE DECISION BELOW THREATENS A BROAD RANGE OF BANKRUPTCY PARTICIPANTS WITH FDCPA LIABILITY.

The Eleventh Circuit extended FDCPA liability to the filing of accurate (if potentially unenforceable) proofs of claim in bankruptcy, actions the court repeatedly conceded are expressly authorized by the Bankruptcy Code. Pet. App. 7a, 8a, 9a, 12a. In so doing, the court contended that its decision would have a minimal impact on bankruptcy proceedings. The court reasoned that the FDCPA applies only to "debt collectors," and that debt collectors "are a narrow subset of the universe of creditors who might file proofs of claim in a Chapter 13 bankruptcy." Pet. App. 9a; Pet. App. 10a (insisting that its ruling would impact only "a narrow range of actors and claims"). But the Eleventh Circuit greatly understated the scope of the FDCPA's coverage. Courts have interpreted the term "debt collector" to apply, for instance, to major banks and attorneys—both critical and frequent participants in many Chapter 13 bankruptcy proceedings. Thus, the decision below threatens a broad range of bankruptcy participants with liability under the FDCPA for doing *exactly* what the Bankruptcy Code prescribes.

The FDCPA by its own terms imposes liability on only "debt collectors"—those businesses whose "principal purpose" is debt collection, as well as businesses that "regularly" collect debts "owed or due another." 15 U.S.C. § 1692a(6). The prototypical debt collector collects debts on behalf of a creditor and receives a contingency fee in return. *See* Consumer Financial

Protection Bureau, *Fair Debt Collection Practices Act* 9 (Annual Report 2016), *available at* http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf (last visited Nov. 16, 2016) (representing more than half of debt-collection revenues in 2015). On the other hand, "creditors"—those businesses that collect their own debts, such as major banks, utilities, and credit card companies—are generally not subject to the Act's mandates. 15 U.S.C. § 1692a(4).

Some courts and government agencies, however, have expansively interpreted the scope of the term "debt collector" under the FDCPA. In particular, some courts have held that banks—the paradigmatic "creditors" *not* subject to FDCPA liability—qualify as "debt collectors" when they purchase debt already in default, and later attempt to collect that debt. *See, e.g.*, *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 358 (6th Cir. 2012) (holding that Deutsche Bank was debt collector with respect to mortgage taken after default); *Frazier v. U.S. Bank Nat'l Ass'n*, No. 11 C 8775, 2013 WL 1337263, at *8 (N.D. Ill. Mar. 29, 2013) (U.S. Bank).[2] The Federal Trade Commission and the Consumer Financial Protection Bureau—the agencies entrusted with enforcement of the FDCPA—agree that the Act covers buyers of debt if the debt was in default at the time of purchase. *See* Brief for FTC as Amicus Curiae Supporting Rehearing En Banc, *Davidson v. Capital One Bank (USA), N.A.*, No. 14-14200, 2015

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[2] *But see Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 140 (4th Cir. 2016) (holding that purchaser of defaulted debt was not debt collector under FDCPA), *petition for cert. filed*, No. 16-349 (U.S. Sept. 16, 2016); *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1318 (11th Cir. 2015) (same).

WL 5608572, at *9 (11th Cir. Sept. 21, 2015) ("A company that regularly buys debts owed to others and collects them is a 'debt collector' under the FDCPA . . . ."); CFPB, *Fair Debt Collection Practices Act* at 33-34 (describing enforcement action taken against "one of the nation's two largest debt buyers").

That sprawling interpretation of "debt collector" could make major banks frequent targets for FDCPA suits predicated on the filing of proofs of claim in bankruptcy. Many banks regularly buy and sell mortgage and consumer debt portfolios, and portions of those portfolios are often in default at the time of purchase. *See, e.g.*, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1311 (11th Cir. 2015) ("Capital One acquired approximately $28 billion of HSBC's United States-based credit card accounts, over $1 billion of which were shown as delinquent or in default at the time of Capital One's acquisition."). Indeed, as of December 2015, just three major banks—Wells Fargo, Bank of America, and JPMorgan Chase—held about $79 billion in residential mortgage and home equity loans that were "acquired with evidence of credit deterioration since their origination."[3]

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[3] Wells Fargo & Co., *Annual Report 2015* 64, 176, *available at* https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2015-annual-report.pdf (last visited Nov. 16, 2016) ($19 billion); Bank of America Corp., *2015 Annual Report* 71, *available at* http://media.corporate-ir.net/media_files/IROL/71/71595/AR2015.pdf (last visited Nov. 16, 2016) ($17 billion); JPMorgan Chase & Co., *Annual Report 2015* 256, *available at* https://www.jpmorganchase.com/corporate/investor-relations/document/2015-annualreport.pdf (last visited Nov. 16, 2016) ($43 billion). Some portion of this $79 billion in purchased mortgage and home equity loans was acquired via merger with entities that originated the loans. Lower courts are divided on

Under the Eleventh Circuit's approach, any time one of those banks attempts to file a proof of claim on such a mortgage, the bank risks facing an FDCPA lawsuit—not only for proofs of claim on potentially time-barred mortgages, but also for proofs of claim that are arguably "false," "misleading," or "unfair" in any respect. 15 U.S.C. §§ 1692e, f. Thus, far from limiting FDCPA liability to a "narrow subset" of creditors, Pet. App. 9a, the Eleventh Circuit's interpretation of the FDCPA would subject one of bankruptcy's most active classes of creditors to massive liability. *See* Tanta Caraman & Thomas C. Kearns, Executive Office for United States Trustees, *Chapter 13 Disbursement Statistics and the Impact of Case Filing Trends* (2013) (payments to mortgage creditors accounted for over 25 percent of total Chapter 13 disbursements in fiscal year 2013).

The decision below also subjects bankruptcy attorneys to potential FDCPA liability, given this Court's holding that the "FDCPA's definition of 'debt collector' includes attorneys who regularly, through litigation, attempt to collect consumer debts." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 593 (2010) (citing *Heintz v. Jenkins*, 514 U.S. 291 (1995)). To be sure, bankruptcy attorneys would have

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whether debt acquired via merger can form the basis of an FDCPA claim. *Compare Brown v. Morris*, 243 F. App'x 31, 35 (5th Cir. 2007) (per curiam) (holding that debt acquired via merger cannot form the basis of FDCPA claim), *with McAdams v. Citifinancial Mortg. Co. of NY*, No. CIV.A.06 27 A, 2007 WL 141128, at *7 (M.D. La. Jan. 16, 2007) (holding that debt acquired via merger may give rise to FDCPA liability). But by any account, billions of dollars in purchased debt are implicated by the broadly interpreted definition of "debt collector" under the FDCPA.

to "regularly" file or defend proofs of claim to trigger FDCPA coverage. *Id.* But "regularity" is often a low bar. *See, e.g.*, *Silva v. Mid Atl. Mgmt. Corp.*, 277 F. Supp. 2d 460, 466 (E.D. Pa. 2003) (holding that firm "regularly" collected debt by taking on at least ten debt-collection cases per year, amounting to less than one percent of firm's total caseload). And once a bankruptcy attorney falls within the ambit of the FDCPA, a wide range of litigation-related activity can subject the attorney to FDCPA liability. *Cf. Marquez v. Weinstein, Pinson & Riley, P.S.*, 836 F.3d 808, 810 (7th Cir. 2016) (holding that FDCPA applies to all "pleadings or filings in court" during debt-collection proceeding).

The threat of such expansive FDCPA liability would significantly undermine the ability of bankruptcy attorneys zealously to represent creditors, and would thereby upset the careful balance between creditors' and debtors' rights that Congress struck in the Bankruptcy Code. *See* S. Rep. No. 95-989, at 12 (1978) (explaining that the "basic purpose" of Chapter 13 is "to permit an individual to pay his debts" while "fairly distributing the funds deposited [in bankruptcy] to creditors until all debts have been paid").

The consequences of affirmance in this case thus would sweep far more widely than the Court of Appeals posited. Rather than affecting just a small group of creditors, the Eleventh Circuit's rule could severely distort a substantial portion of Chapter 13 bankruptcy proceedings.

II. THE DECISION BELOW HARMS THE BANKRUPTCY SYSTEM BY PENALIZING PARTICIPATION IN THE CLAIMS ADJUDICATION PROCESS.

The Eleventh Circuit's rule will force a broad range of bankruptcy participants to make complex legal judgments about whether a debt is time-barred *prior* to exercising their right to file a proof of claim in bankruptcy, instead of allowing those questions to be decided in the claims adjudication process as envisioned by the Bankruptcy Code. And under the decision below, bankruptcy creditors and their attorneys will be threatened with potential liability even for good faith interpretations of state law. The obvious result is that certain creditors, fearing FDCPA liability, will forgo their rights under the Bankruptcy Code, filing fewer proofs of claim on arguably time-barred debts. That development would be troubling for the entire bankruptcy system. The decision below plainly harms creditors, but it also fails to provide any countervailing protections to debtors, who are already covered by a network of protections in bankruptcy. Furthermore, the incentives created by the decision will actually harm debtors by causing liabilities to be unaddressed in bankruptcy—depriving debtors of the fresh start promised by the Bankruptcy Code and thwarting the bankruptcy system's goal of collective treatment of claims.

A. The Eleventh Circuit's Rule Subjects Bankruptcy Participants Covered By The FDCPA To Liability For Good Faith Interpretations Of State Law.

The Eleventh Circuit acknowledged, as it must, that its extension of FDCPA liability will leave bankruptcy creditors that are covered (or arguably covered) by the definitional provisions of the FDCPA "vulnerable to a claim" under that statute any time they file a knowingly time-barred proof of claim. Pet. App. 7a. Contrary to the Eleventh Circuit's assurances, there is good reason to believe that the purported limitation of FDCPA liability to "'knowingly' time-barred" claims will *not* "limit application of the FDCPA to a narrow range of . . . claims." Pet. App. 10a. Importantly, the decision below failed to recognize that determining whether a debt is time-barred is not always easy. Thus, the Eleventh Circuit's rule would expose creditors to conflicting standards of liability in the lower courts for good faith—but ultimately erroneous—interpretations of state law.

A creditor attempting to determine whether a debt is time-barred would often have to analyze (i) which state's law applies, (ii) which limitations period applies, and (iii) whether the limitations period has been tolled.

Choice of law: Creditors attempting to avoid the liability threatened by the decision below would first have to determine which state's law provides the applicable statute of limitations. Unfortunately for them, "[c]ontracts is one of the most complex and most confused areas of choice of law." Restatement (Second) of Conflict of Laws ch. 8, intro. note (1971). Even

when a contract contains a choice-of-law provision, some courts hold that "'contractual choice-of-law clauses incorporate only substantive law, not procedural provisions such as statutes of limitations.'" *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 834-35 (N.D. Ohio 2010) (citation omitted) (applying Ohio statute of limitations notwithstanding contractual provision stating New Hampshire law governed). *But see McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268, 1275 (M.D. Fla. 2008) (holding in FDCPA action that contractual choice-of-law provision incorporated Delaware statute of limitations).

Uncertainty also persists in the absence of a binding contractual choice-of-law clause. The law of the forum state provides one possible source for the applicable statute of limitations. Restatement (Second) of Conflict of Laws § 142(2) (1971) ("An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as stated in § 143."). Under state law borrowing statutes, however, courts must in certain circumstances look to the law of the state where the cause of action accrued. *See id.* § 143; *Hamid v. Stock & Grimes, LLP*, No. CIV.A. 11-2349, 2012 WL 2135502, at *2 (E.D. Pa. June 12, 2012) (holding that state where claim accrued provided statute of limitations under Pennsylvania choice-of-law statute); *cf. Cope v. Anderson*, 331 U.S. 461, 464-68 (1947) (discussing operation of state law "borrowing statutes" in determining which state's law governs).

Applicable limitations period: In addition to facing choice-of-law uncertainties, creditors must determine precisely which limitations period applies under governing state law. This analysis may involve unsettled questions of state law, leaving potential filers to make educated guesses on how a future federal court will interpret state law.

A particularly thorny problem involves whether an action to collect on credit card debt should be considered an action based on a written agreement. *See, e.g., Uche v. N. Star Capital Acquisition, LLC*, No. 4:09CV3106, 2010 WL 5256350, at *7 (D. Neb. Dec. 15, 2010) (noting in FDCPA action that "Nebraska law is unsettled regarding whether 'collections of third-party (bank) credit card debt' actions are actions based on written agreements or actions based on 'open accounts,'" which would trigger different limitations periods). As just one example, a federal district court denied a group of defendants' motion for summary judgment on an FDCPA claim notwithstanding the defendants' reliance on a prior decision of the Iowa Court of Appeals construing a substantially identical credit card agreement as a "written agreement" for purposes of the Iowa statute of limitations. *New v. Gemini Capital Grp.*, 859 F. Supp. 2d 990, 998 (S.D. Iowa 2012). The district court recognized that the defendants "understandably" may have relied on the prior state court opinion "when they considered whether to file suit." *Id.* Nevertheless, because that opinion was unpublished, the district court held that the defendants were not shielded from FDCPA liability when a subsequent state court determined that the defendants' agreement was subject to another, shorter statute of limitations. *Id.*

Tolling of the limitations period: Further complicating matters, actions that would otherwise seem to be plainly barred by the applicable statute of limitations may actually be timely due to tolling of the limitations period. Several state statutes, for example, "toll the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state and are not otherwise subject to service of process in the state." *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 18 (Del. 2005); *accord, e.g.*, Mich. Comp. Laws § 600.5853.

Relatedly, many states provide that a statute of limitations may be tolled or restarted (e.g., where a debt is revived) by a debtor's acknowledgement of a debt or a promise to pay. *See, e.g., Owens v. LVNV Funding, LLC*, 832 F.3d 726, 732 n.6 (7th Cir. 2016) (noting that under Illinois law "the statute of limitations period can be restarted by the debtor's conduct, such as by making a payment on or promising to pay the debt"), *petition for cert. filed*, No. 16-315 (U.S. Aug. 26, 2016).

This is just a brief sketch of the problems faced by creditors subject to the FDCPA under the Eleventh Circuit's approach. Tellingly, even judges who agree with aspects of the Eleventh Circuit's decision concede the complications faced by creditors in this context. *See id.* at 740 (Wood, J., dissenting) (recognizing that there will be cases where the statute of limitations "is the subject of a fair dispute").

In addition to ignoring the complications in determining whether a debt is time-barred, the Eleventh Circuit also underestimated the risks faced by bankruptcy participants in claiming that FDCPA liability

under its rule will extend only to proofs of claim on "knowingly" time-barred debts. Pet. App. 10a. But the Courts of Appeals (including the Eleventh Circuit) uniformly describe the FDCPA as "a 'strict liability' statute." *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259 n.4 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015); *accord Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 n.7 (3d Cir. 2011) ("The characterization of the FDCPA as a strict liability statute is generally accepted.") (collecting cases). Thus, to make out a prima facie case of an FDCPA violation under the decision below, the debtor need not prove that the creditor *knew* the claim was time-barred. Instead, to avoid the "severe remedy of civil liability for damages," Pet. App. 13a, a creditor would have an affirmative obligation to show "by a preponderance of evidence" that the proof of claim on a time-barred debt was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," 15 U.S.C. § 1692k(c); Pet. App. 10a.

The Eleventh Circuit's gesture to the purported "safe harbor" of Section 1692k(c), Pet. App. 10a, will also prove illusory for many creditors. As this Court recognized in *Jerman*, the Courts of Appeals are divided "about whether 15 U.S.C. § 1692k(c) applies to violations of the FDCPA resulting from a misinterpretation of the requirements of state law." 559 U.S. at 580 n.4 (identifying conflicting decisions from Eighth and Tenth Circuits). The Sixth and Eighth Circuits, as well as a number of district courts, have affirmatively held that "mistakes of state law can give rise to liability" under the FDCPA. *Wise v. Zwicker & As-*

socs., P.C., 780 F.3d 710, 713 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 793 (2016); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451-52 (8th Cir. 2001) (rejecting application of Section 1692k(c) to mistaken legal interpretation of a Minnesota garnishment statute).[4] These problems are especially acute where, as is often the case, the relevant state courts have not issued an authoritative interpretation of the legal question at issue. *See Sayyed v. Wolpoff & Abramson, LLP*, 733 F. Supp. 2d 635, 645 n.6 (D. Md. 2010) (explaining that "the unseen hazards to the collecting attorney would seem to be considerable" when errors involve misinterpretations of state law).

The Fifth and Eleventh Circuits, meanwhile, have issued opinions reserving judgment on this crucial question—leaving creditors in limbo as to whether their good faith legal analysis may nevertheless subject them to FDCPA liability in those jurisdictions. *See Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1273 n.13 (11th Cir. 2011) (noting that "[w]e also need not address this issue"); *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 614 F. App'x 146, 156 (5th Cir. 2015) (per curiam) (declining to address the issue "on which the Supreme Court expressly reserved judgment" because any mistake ultimately turned on the requirements of the FDCPA), *cert. denied*, 136 S. Ct. 1160 (2016).

Finally, other courts, including the Seventh and Tenth Circuits, have held that a debt collector could attempt to establish a bona fide error under Section

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[4] *See also, e.g., Ballou v. Law Offices Howard Lee Schiff, P.C.*, 713 F. Supp. 2d 79, 82 (D. Conn. 2010); *Hamid*, 2012 WL 2135502, at *2.

1692k(c) for mistakes of state law. *E.g.*, *Johnson v. Riddle*, 305 F.3d 1107, 1121 (10th Cir. 2002) (concluding that Section 1692k(c) applied to misinterpretation of a Utah dishonored check statute); *Jenkins v. Heintz*, 124 F.3d 824, 833 (7th Cir. 1997) (rejecting interpretation of FDCPA that would foreclose bona fide error defense for claim "not legally authorized by the contract with the debtor"); *see also Gray v. Suttell & Assocs.*, 123 F. Supp. 3d 1283, 1288-89 (E.D. Wash. 2015) (reserving judgment but recognizing pre-*Jerman* Ninth Circuit case law generally excluding mistakes of law from Section 1692k(c)). Assuming that bankruptcy creditors would be permitted to attempt a showing of bona fide error under Section 1692k(c), creditors would still be faced with time-consuming and uncertain litigation revolving around the intent behind their misapprehension of state law principles.

The conflicts in the lower courts over the scope of Section 1692k(c)'s safe harbor—and the difficult questions of intent and legal judgment remaining even if a bona fide error defense were available nationwide, which it is not—further support reversal.

B. The Chilling Effect Of The Eleventh Circuit's Rule Will Also Harm Debtors.

Faced with the threat of FDCPA liability for good faith interpretations of state law, bankruptcy creditors covered by the FDCPA may rightfully conclude that any attempt to file a proof of claim on an arguably time-barred debt will simply buy them a lawsuit and choose to forgo filing such proofs of claim altogether. That result provides no benefit to, and affirmatively disadvantages the very debtors the FDCPA was designed to protect. This buttresses the conclusion that

the FDCPA was never intended to regulate the bankruptcy claims adjudication process.

The point of the bankruptcy system is to resolve, once and for all, the debts of the estate. The chilling effect of the Eleventh Circuit's rule "'undermines the bankruptcy system's interest in 'the collective treatment of all of a debtor's creditors at one time.'" *In re Dubois*, 834 F.3d 522, 531 (4th Cir. 2016) (quoting 1 Norton Bankr. L. & Prac. 3d § 3:9 (2016)).

Keeping proofs of claim out of bankruptcy will provide no financial benefit to the vast majority of debtors. That is because "Chapter 13 debtors typically do not enter into 100 percent repayment plans." 834 F.3d at 532. In that circumstance, the filing of additional claims against a Chapter 13 estate may result in unsecured creditors receiving "a smaller share of available funds but *the total amount paid by the debtor remains unchanged*." *Id.* (emphasis added); *accord*, *e.g.*, *Nelson v. Midland Credit Mgmt., Inc.*, 828 F.3d 749, 752 (8th Cir. 2016).[5]

What is more, deterring the filing of proofs of claim on arguably time-barred debts will actually harm debtors. If a "debt is unscheduled and no proof of claim is filed, the debt continues to exist" after bankruptcy. *In re Dubois*, 834 F.3d at 531. Time-barred debts are particularly prone to being accidentally left out of the debtor's bankruptcy petition due to the passage of time. *See Crawford*, 758 F.3d at 1261 (noting that the "debtor's memory of a stale debt

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[5] The same holds true in Chapter 7 proceedings. Most Chapter 7 debtors have no financial interest in the bankruptcy estate. *See* 4 Norton Bankr. L. & Prac. 3d § 86:29 (2016).

may have faded and personal records documenting the debt may have vanished"). After bankruptcy, even if the debt turns out to be time-barred, the creditor "may lawfully pursue collection activity apart from filing a lawsuit." *In re Dubois*, 834 F.3d at 531. But if it turns out that the debt is *not* time-barred, the debtor has bigger problems. In that case, a creditor could proceed to file a lawsuit against a debtor who just emerged from bankruptcy. Either result denies the "'honest but unfortunate debtor'" the "'fresh start'" that is "[t]he principal purpose of the Bankruptcy Code." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991)).

The counterproductive effects of extending FDCPA liability to the filing of accurate proofs of claim point to a larger structural reason why the FDCPA has no place in personal bankruptcy proceedings: The FDCPA was designed to prevent—not to regulate—personal bankruptcy. As this Court explained in *Kokoszka v. Belford*, the Consumer Credit Protection Act ("CCPA")—the predecessor statute to the FDCPA—performs an entirely different function than the bankruptcy laws: "[T]he Consumer Credit Protection Act sought to prevent consumers from entering bankruptcy in the first place," but "if, despite its protection, bankruptcy did occur, the debtor's protection and remedy remained under the Bankruptcy Act." 417 U.S. 642, 651 (1974).

The FDCPA, like the CCPA, was designed to *prevent* the onset of personal bankruptcy. *See* 15 U.S.C. § 1692(a) ("Abusive debt collection practices contribute to the number of personal bankruptcies . . . ."). Tracking the reasoning in *Kokoszka*, multiple Courts

of Appeals have thus recognized that the FDCPA's purpose to protect "unsophisticated consumers from unscrupulous debt collectors" is simply "not implicated when a debtor is instead protected by the [bankruptcy] court system and its officers." *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (internal quotation marks omitted); *accord Nelson*, 828 F.3d at 752 (citing *Simmons* and holding that the Bankruptcy Code's "protections against harassment and deception satisfy the relevant concerns of the FDCPA").

There is at bottom no reason to adopt the Eleventh Circuit's skewed interpretation of the FDCPA, which would subject a broad range of bankruptcy participants to expansive liability for actions expressly permitted by the Bankruptcy Code, undermine the basic purposes of the Code, and harm the very debtors the FDCPA was designed to protect.

III. Imposing Liability For Filing Accurate Proofs Of Claim Will Generate Confusion And Conflicts Between The FDCPA And The Bankruptcy Code.

The Eleventh Circuit's ruling threatens to impose sweeping FDCPA liability for the filing of accurate claims in bankruptcy notwithstanding its "recogni[tion] that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations." Pet. App. 7a. And while the decision below insisted that "the FDCPA and the Code can coexist," Pet. App. 13a, it acknowledged that by taking actions specifically permitted by the Bankruptcy Code, a bankruptcy creditor "is simply opening

himself up to a potential lawsuit for an FDCPA violation." Pet. App. 14a. The statutory conflict created by the Eleventh Circuit's rule is patent. Importing the FDCPA into bankruptcy proceedings will create other serious conflicts between the Bankruptcy Code and the FDCPA that will spawn additional confusion. These added complications provide further reason to resist the Eleventh Circuit's extension of FDCPA liability to actions in bankruptcy.

There is nothing "simpl[e]," Pet. App. 14a, about reading one federal statute to outlaw as "unfair" conduct that another federal statute explicitly prescribes. That jarring result is *itself* unfair. And it violates "the most rudimentary rule of statutory construction": "[C]ourts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion).

Beyond the obvious conflict of imposing liability under the FDCPA for an action "'explicitly contemplate[d]'" by the Bankruptcy Code, Pet. App. 8a (citation omitted), the rule applied below creates a threshold conflict by equating the filing of a proof of claim in bankruptcy with debt-collection activity under the FDCPA. This approach, if followed consistently, would turn every proof of claim into a violation of the Bankruptcy Code's automatic stay provision.

The Eleventh Circuit's prior decision in *Crawford v. LVNV Funding, LLC*, held that filing a proof of claim "is, at the very least, an 'indirect' means of collecting a debt" against a consumer. 758 F.3d at 1262. But Section 362(a)(6) of the Bankruptcy Code bars any action to "collect, assess, or recover a claim

against the debtor that arose before the commencement of the [bankruptcy] case." 11 U.S.C. § 362(a)(6) (emphasis added). Thus, if filing a proof of claim is an attempt to collect a debt from a consumer debtor, as the decision below implicitly held, then it would logically *also* be an attempt to recover a claim "against the debtor" in violation of the automatic stay. This absurd result places the Bankruptcy Code (which expressly permits the filing of proofs of claim, including for disputed debts, Pet. App. 8a) at war with itself.

This conflict derives from the Eleventh Circuit's misunderstanding of bedrock principles of bankruptcy. It is an elementary proposition of bankruptcy law that "[t]he bankruptcy 'estate' is a separate and distinct legal entity" from the debtor. Charles Jordan Tabb, *The Law of Bankruptcy* § 5.1, at 389 (3d ed. 2014); *accord, e.g.*, *United States v. Mitchell*, 476 F.3d 539, 544 (8th Cir. 2007) ("The filing of a bankruptcy petition creates a new legal entity: the bankruptcy estate."). Because a proof of claim asserts a right to payment "against the debtor's estate," *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449 (2007), neither the FDCPA nor the automatic stay applies to the filing of proofs of claim. The FDCPA does not apply because it regulates attempts to collect financial obligations only from natural persons. 15 U.S.C. § 1692a(3) (defining "consumer" as "any natural person obligated . . . to pay any debt"); *id.* § 1692a(5) (defining "debt" as any "obligation of a consumer to pay money" arising from personal, family, or household purposes). And the automatic stay is inapt because a proof of claim is not a claim "against the debtor," 11 U.S.C. § 362(a)(6), but rather "against the debtor's estate," *Travelers*, 549 U.S. at 449.

The Eleventh Circuit's rule also clashes with the notice and other technical requirements of the FDCPA. As the Ninth Circuit's Bankruptcy Appellate Panel explained, "the debt validation provisions required by [the] FDCPA clearly conflict with the claims processing procedures contemplated by the [Bankruptcy] Code and Rules," such that "the provisions of both statutes cannot compatibly operate." *In re Chaussee*, 399 B.R. 225, 238 (B.A.P. 9th Cir. 2008).

Specifically, Section 1692e(11) of the FDCPA requires that in an "initial communication" with the debtor, a debt collector must include certain disclosures. 15 U.S.C. § 1692e(11). In addition, Section 1692g of the FDCPA requires debt collectors to send debtors a notice that includes information concerning the method for disputing the debt "[w]ithin five days" after an initial debt-collection communication. *Id.* § 1692g(a). The problem with applying these provisions to actions in bankruptcy, as several courts have recognized, is that sending such notices to debtors has been held to violate the automatic stay. *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 280 (3d Cir. 2013) ("Several courts have held that sending a § 1692e(11) notice violates the automatic stay."); *In re Chaussee*, 399 B.R. at 238 ("[S]ending [a § 1692g(a)] notice to a debtor in a pending bankruptcy case has been held to violate the automatic stay."). It is "puzzl[ing]" how creditors "can comply with both statutory schemes when the Code dictates they *cease* all collection actions, whereas [the] FDCPA *requires* them to com-

municate with the debtor in connection with the collection of a debt." *In re Chaussee*, 399 B.R. at 238 (emphases added).[6]

These notices, moreover, "would undoubtedly cause confusion" for consumers due to the differing methods for disputing a debt under the FDCPA and the Bankruptcy Code. *Id.* at 239. For example, the bankruptcy rules permit any party in interest to object to a claim at any time up until thirty days prior to a hearing on that claim. Fed. R. Bankr. P. 3007(a); 11 U.S.C. § 502(a). The FDCPA, by contrast, requires debt collectors to inform debtors that they must dis-

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[6] Some may attempt to avoid this conflict by arguing that proofs of claim are "formal pleading[s]" and are therefore exempt from the FDCPA communication requirements. 15 U.S.C. § 1692e(11) (exempting "formal pleading made in connection with a legal action" from initial written communication requirement); *see also id.* § 1692g(d) (exempting a "communication in the form of a formal pleading in a civil action" from notice requirements in Section 1692g(a)). It is an open question whether a proof of claim is a "formal pleading" for purposes of these exemptions. *See* Fed. R. Civ. P. 7(a) (identifying the only "pleadings [that] are allowed" as complaints, answers, and replies to answers); *In re Beaulieu*, No. EP 99-004, 2001 WL 36384162, at *3 (B.A.P. 1st Cir. Sept. 7, 2001) (holding that the definition of "Pleading" in Rule 7 "does not include a proof of claim"); *In re Lijoi*, 288 B.R. 511, 515 (Bankr. E.D. Tenn. 2002) (holding that "Proof of Claim" "is not a pleading" within the meaning of Rule 7). *But see, e.g.*, *Reed v. LVNV Funding, LLC*, No. 14 C 8371, 2015 WL 1510375, at *5 (N.D. Ill. Mar. 27, 2015) (rejecting statutory conflict and holding that proof of claim is a formal pleading in a civil action). In any event, creditors confronting the FDCPA's notice requirements under the Eleventh Circuit's approach will be forced to run the substantial risk of violating either the Bankruptcy Code's automatic stay provision or the FDCPA's notice requirements.

pute the validity of a debt within thirty days of receiving the notice, and that any dispute will trigger an informal debt validation procedure. *See* 15 U.S.C. § 1692g(a)(3)-(4).

On top of that, "a proof of claim filed in a bankruptcy case constitutes prima facie evidence of its validity and is deemed allowed unless and until the debtor [or another interested party] objects to it," whereas the "FDCPA provides that, if the consumer fails to dispute the validity of a debt, that failure may not be construed by any court as an admission of liability by the consumer." *In re Chaussee*, 399 B.R. at 238. Debtors faced with these dueling standards would have to determine whether they need to comply with both the FDCPA and bankruptcy requirements for disputing debts, or whether it is sufficient to follow only one or the other of these conflicting procedures.

There is no justification for injecting this level of uncertainty and confusion into the bankruptcy claims adjudication process. The conflicts created by the Eleventh Circuit's rule are more proof that the FDCPA was never intended to regulate bankruptcy. *See Jerman*, 559 U.S. at 599-600 (explaining that the FDCPA's conduct-regulating provisions "should not be assumed to compel absurd results when applied to debt collecting attorneys").

IV. THE DECISION BELOW WILL EXACERBATE THE COTTAGE INDUSTRY OF FDCPA LITIGATION.

The FDCPA's plaintiff-friendly features—such as statutory damages and mandatory attorney's fees—have given rise to a cottage industry in which the primary beneficiaries of the Act's protections are not

debtors, but debtors' attorneys. Imposing FDCPA liability for filing accurate proofs of claim in bankruptcy would serve only to exacerbate the booming business of FDCPA litigation at the expense of debtors, creditors, and the bankruptcy system as a whole.

1. Several features of the FDCPA combine to create a recipe for vexatious litigation. First, the Act imposes numerous technical procedural requirements on debt collectors, while at the same time subjecting debt collectors to vague standards of conduct. *See* 15 U.S.C. § 1692g(a) (setting out detailed notice requirements); *see also id.* § 1692e (prohibiting any "false, deceptive, or misleading" collection methods); *id.* § 1692f (prohibiting any "unfair or unconscionable" collection methods). That combination of detailed and open-ended prescriptions makes minor violations of the Act all but unavoidable. *See Jerman*, 559 U.S. at 618 (Kennedy, J., dissenting).

In addition, the FDCPA imposes harsh civil sanctions for violations of "*any* provision" of the Act. 15 U.S.C. § 1692k(a) (emphasis added). The Act permits a plaintiff to recover actual and statutory damages, including statutory damages in class actions up to the lesser of $500,000 or one percent of the debt collector's net worth. *Id.* § 1692k(a)(2)(B). Moreover, the FDCPA mandates that successful plaintiffs' attorneys recover costs and reasonable attorney's fees. *Id.* § 1692k(a)(3). Costs and attorney's fees in FDCPA cases can be significant; they frequently make up the bulk of the total recovery in a given case. *See, e.g.*, *Norton v. Wilshire Credit Corp.*, 36 F. Supp. 2d 216, 221 (D.N.J. 1999) (awarding $58,000 in fees and costs and only $5,800 in actual and statutory damages); *Nguyen v. HOVG, LLC*, No. 14CV837 BTM (RBB),

2015 WL 5476254, at *6 (S.D. Cal. Sept. 15, 2015) (awarding $41,000 in fees and costs and $3,000 in damages).

The upshot is that the FDCPA creates strong incentives to file lawsuits even in cases where debt collectors commit good faith, technical violations of the law that cause no actual harm to debtors. As Justice Kennedy has explained:

> This happens when the plaintiff can recover statutory damages for the violation and his or her attorney will receive fees if the suit is successful, no matter how slight the injury. A favorable verdict after trial is not necessarily the goal; often the plaintiff will be just as happy with a settlement, as will his or her attorney (who will receive fees regardless). The defendant, meanwhile, may conclude a quick settlement is preferable to the costs of discovery and a protracted trial.

Jerman, 559 U.S. at 616 (Kennedy, J., dissenting).

2. The interaction of the FDCPA's liability and remedial provisions has produced a rash of FDCPA litigation. In fact, the growth in FDCPA litigation over the past decade and a half is so staggering that calling this litigation a mere "cottage" industry is now a genteel understatement.

Since 2001, the number of plaintiffs bringing individual FDCPA claims in federal court has grown by nearly *900 percent*—from around 1,300 plaintiffs in 2001 to over 11,800 plaintiffs in 2015. App. 1a. This litigation bonanza, rather than vindicating debtors who are actually harmed by abusive debt-collection practices, appears to be driven primarily by a small

number of attorneys whose practices revolve around suing debt collectors. Statistics compiled by FDCPA Case Listing Service, LLC, a service that tracks federal consumer lawsuits, illustrate the point: Through September 2016, just *ten* law firms represented an astounding 23 percent of the more than 9,500 plaintiffs who brought individual claims under the FDCPA and the Telephone Consumer Protection Act in federal court this year. App 2a. One of the most active consumer litigation attorneys boasts that he has personally "litigated over 5,000 individual Plaintiff's cases," mainly using the FDCPA and an analogous state law. *See* Law Offices of Todd M. Friedman, P.C., http://www.toddflaw.com/About/Todd-M-Friedman.shtml (last visited Nov. 16, 2016).

This boom in attorney-driven FDCPA litigation has not escaped the notice of courts and commentators. For instance, Justice Kennedy's dissent in *Jerman*, 559 U.S. at 617, discussed at length the "troubling dynamic of allowing certain actors in the system to spin even good faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." And Justice Kennedy was not the first (or last) federal judge or commentator to take heed of the troubling rise in FDCPA litigation. *See, e.g.*, *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009) (quoting *Jacobson v. Healthcare Fin. Servs.*, 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006)) (recognizing the "cottage industry" that has formed around FDCPA litigation); *see also* Terry Carter, *Payback: Lawyers on Both Sides of Collection Are Feeling Debt's Sting*, 96 A.B.A. J., Dec. 2010, at 41, 43 ("There is a fast-growing cottage

industry of lawyers suing debt collectors" under the FDCPA.).

The FDCPA litigation industry imposes costs on creditors and debtors alike. Creditors are harmed because FDCPA suits—particularly class-action suits—can be "used to force settlement even absent fault or injury." *Jerman*, 559 U.S. at 612 (Kennedy, J., dissenting). That is because "the settlement amounts sought are small enough that debt collectors view settlement as economically advantageous—even where they may possess a meritorious defense." Matthew R. Bremner, Note, *The Need for Reform in the Age of Financial Chaos*, 76 Brook. L. Rev. 1553, 1580-81 (2011). But debtors can be victimized by excessive FDCPA litigation as well. Overzealous enforcement of technical violations drives up debtors' borrowing costs and can "divert[] private enforcement efforts away from prosecuting the truly harmful consumer abuses that Congress initially sought to eliminate" in enacting the FDCPA. *Id.* at 1556, 1579 (explaining that suits based on technical FDCPA violations, as opposed to more substantive violations, more "often present facts that are readily certifiable as a class action").

3. The current state of FDCPA litigation is problematic enough. Extending FDCPA liability to the filing of accurate proofs of claim in bankruptcy would just exacerbate the problem. If the decision below is allowed to stand, there can be no doubt that a nationwide explosion of FDCPA litigation would quickly ensue.

The Eleventh Circuit's experience provides an excellent case study: Within one week of the Eleventh

Circuit's ruling in *Crawford v. LVNV Funding, LLC*—the precursor to the ruling under review—*six* putative class-action complaints were filed in the Southern District of Alabama alone. All six suits, including this case, were filed by the same lawyer, and all six suits contained nearly identical five- to six-page complaints alleging that the filing of proofs of claim in bankruptcy proceedings violated the FDCPA.[7] Moreover, in the two years since *Crawford* was decided, debtors in Eleventh Circuit bankruptcy proceedings have initiated eighty-one adversary proceedings against LVNV Funding, LLC—the defendant in *Crawford*. Seventy-two of those eighty-one adversary proceedings involved FDCPA claims predicated on the filing of proofs of claim in bankruptcy.[8]

A key practical reason for this astounding number of FDCPA suits—against just *one* defendant in *one* circuit—is that plaintiffs' attorneys can quickly and cheaply produce FDCPA complaints predicated on the filing of proofs of claim. Indeed, on September 15,

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[7] *See* J.A. 23-28; *Russell v. Palisades Collection, L.L.C.*, No. 1:14-cv-00323-CG-B; *Brock v. Resurgent Capital Servs., LP*, No. 1:14-cv-00324-WS-M; *Davis v. AIS Recovery Solutions, LLC*, No. 1:14-cv-00325-WS-M; *Spain v. RJM Acquisitions LLC*, No. 1:14-cv-00326-CG-N; *Russell v. Jefferson Capital Sys., LLC*, No. 1:14-cv-00331-CG-B.

[8] To review this data, go to www.bloomberglaw.com, then to "Litigation & Dockets," and finally to "Search Dockets." Limit the search to Alabama, Georgia, and Florida bankruptcy courts. Use the party name "LVNV Funding," the keyword "adversary case," and a date range of the last five years. As of November 16, 2016, that search yielded 86 adversary proceedings, 81 of which were filed after July 10, 2014—the date of the *Crawford* decision. Seventy-two of those 81 adversary proceedings involve FDCPA claims predicated on the filing of proofs of claim in bankruptcy.

2014, just one lawyer initiated twelve of the seventy-two adversary proceedings that have been brought against LVNV Funding, LLC, by filing twelve virtually identical, six-page complaints. *See, e.g.*, *Thompson v. LVNV Funding, LLC et al.*, No. 14-80122-CRJ (Bankr. N.D. Ala.); *Williams v. LVNV Funding, LLC et al.*, Docket No. 14-70043-JHH (Bankr. N.D. Ala.). The filing of such complaints, moreover, is often costless, as debtors' attorneys typically need not pay a filing fee in order to initiate adversary proceedings in bankruptcy. *See* 28 U.S.C. § 1930(f) (granting bankruptcy courts discretion to waive debtor fees); Bankruptcy Court Miscellaneous Fee Schedule, http://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule (last visited Nov. 16, 2016) (stating that fee for filing adversary complaint "must not be charged if . . . the debtor is the plaintiff"). And while it is true that *successful* debtors' attorneys in district court will recover any filing fees from the defendant, *see supra* p. 27, in bankruptcy court debtors' attorneys can avoid the up-front cost of a filing fee, further catalyzing the initiation of FDCPA suits.

Examining nationwide bankruptcy statistics further underlines the problems posed by the Eleventh Circuit's ruling. In 2015 alone there were over 800,000 personal bankruptcy filings, undoubtedly involving millions of proofs of claim. U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2015, *available at* http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2015/12/31 (last visited Nov. 16, 2016). It is therefore no exaggeration to say

that the Eleventh Circuit's extension of the FDCPA would lead to a "flood of FDCPA disputes" that would "threaten[] to swallow the dockets of bankruptcy and district courts." Alane A. Becket et al., *Filer Beware! It's Not Just the Rules Committee Changing the Rules*, Norton Bankr. L. Adviser, Sept. 2014, at 1, 8.

* * *

The Eleventh Circuit's decision—if left unchecked—will subject a broad range of bankruptcy participants to liability under conflicting legal standards for doing precisely what the Bankruptcy Code tells them to do with time-barred debts, and even when they carefully adhere to every single legal requirement for filing proofs of claim for such debts under the Bankruptcy Code and Rules. It will also harm the very debtors the FDCPA was designed to protect, create a number of additional conflicts between the FDCPA and the Bankruptcy Code, and fan the bonfire of FDCPA litigation. This Court should reverse the Eleventh Circuit's judgment, and confirm that there can be no FDCPA liability for filing an accurate proof of claim in compliance with the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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APPENDIX

Number of Individual Plaintiffs Bringing FDCPA Claims in Federal District Court by Year*	
Year	**FDCPA Plaintiffs**
2001	1,323
2002	1,711
2003	2,120
2004	2,783
2005	3,207
2006	3,680
2007	4,316
2008	6,140
2009	9,410
2010	11,154
2011	12,226
2012	11,373
2013	10,616
2014	10,240
2015	11,813
2016 (through 9/30/16)	8,029

* Data provided by WebRecon, LLC. The database consists of all plaintiffs who brought FDCPA claims in U.S. District Courts between January 1, 2001 and September 30, 2016.

Ten of the Most Active Law Firms in Terms of FDCPA and TCPA Plaintiffs Represented in Federal Court from January 1, 2016 to September 30, 2016*

Law Firm	Number of Individual FDCPA and TCPA Plaintiffs Represented	Percent of Total FDCPA and TCPA Plaintiffs (9,592 Total)
Lemberg Law	362	3.77%
Law Offices of Todd M. Friedman, P.C.	282	2.94%
Kimmel & Silverman, P.C.	257	2.68%
Morgan & Morgan	245	2.55%
Baker Sanders, LLC	203	2.12%
Community Lawyers Group	195	2.03%
Consumer Law Partners, LLC	192	2.00%
Sulaimon Law Group, LTD	187	1.95%
Edelman, Combs, Latturner & Goodwin, LLC	166	1.73%
Berry & Associates	152	1.58%
Totals	**2,241**	**23.36%**

* The figures in this table were derived from a database provided by FDCPA Case Listing Service, LLC. The database consists primarily of all plaintiffs who brought FDCPA claims in U.S. District Courts between January 1, 2016 and September 30, 2016. The database also includes some plaintiffs who brought TCPA claims in U.S. District Courts during that time period.

RD

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No. 16-348

In The
Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF DBA INTERNATIONAL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND FOR REVERSAL OF THE DECISION OF THE COURT BELOW

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CORPORATE DISCLOSURE STATEMENT

Amicus DBA International, Inc., is a non-profit corporation, has no parent entity and no publicly held company owns 10% or more of its stock.

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DBA International, Inc. respectfully submits this *amicus curiae* brief in support of Petitioner for reversal of the decision of the court below.[1]

STATEMENT OF IDENTITY AND INTEREST

DBA International, Inc. ("DBA International") is the nonprofit trade association that represents more than 550 companies that purchase or support the purchase of performing and non-performing receivables on the secondary market. Members of DBA International must conform to its Code of Ethics which requires members to adhere to the highest standard of professional conduct.

In 2013, DBA International introduced the Receivables Management Certification Program (the "Program"). The Program promotes uniform, consumer-oriented, best practice standards for the receivables management industry. The Program accomplishes this through the adoption of national standards for the receivables management industry, including debt buying

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. Those consents have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

companies, third party agencies and collection law firms, to ensure that those who are certified are not only complying with, but exceeding, state and federal statutory requirements, responding to consumer complaints and inquiries, and adhering to industry best practices.

The debt buying companies certified by the Program hold approximately 80 percent of all purchased receivables in the country, by DBA International's estimates.

The Program requires debt buying companies to undergo an independent third-party compliance audit to validate conformity with the Program's standards. This audit includes an onsite inspection of the certified companies to validate full integration of DBA International's standards into the company's operations. Following a company's initial certification, review audits continue to be conducted every two to three years.

Program certification also requires DBA International member companies to engage, at the minimum, a chief compliance officer, with a direct or indirect reporting line to the president, chief executive officer, board of directors, or general counsel of the company. The chief compliance officer must maintain individual certification through the Program by completing 24 credit hours of continuing education every two years.

One standard of the Program concerns debts subject to expired limitations periods. The standard provides:

> Statute of Limitations. A Certified Company shall not knowingly bring or imply that it has the ability to bring a lawsuit on a debt that is beyond the applicable statute of limitations, even if state law revives the limitations period when a payment is received after the expiration of the statute. This standard shall not be interpreted to prevent a Certified Company from continuing to attempt collection beyond the expiration of the statute provided there are no laws and regulations to the contrary.
>
> DBA International, Receivables Management Certification Program, p. 12, Series "A" Standard (12), Version 4.0 (effective August 1, 2016), publicly available at http://tinyurl.com/jdt5kqb.[2]

The Program's standard protects consumers from the possibility that a payment may revive an expired limitations period while at the same time allowing companies certified by the program to continue collection efforts. DBA International has worked with state legislatures and attorneys general in an effort to adopt this standard to all debt collection activity. In the past two years Connecticut (P.A. 16-65, § 53 (May 26, 2016)), Maine (P.L. No. 272 (June 30, 2015)) and Maryland (2016 Md. ALS 579, 2016 Md. Laws 579, 2016 Md. Chap. 579, 2016 Md. SB 771, 2016 Md. ALS 579, 2016 Md. Laws 579, 2016 Md. Chap. 579, 2016 Md. SB 771 (May 19, 2016)) have all enacted legislation largely adopting the Program's standard. DBA International

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[2] Series "A", Standard 12 was first adopted by the Program in 2013 and last revised in August of 2016.

continues to promote this standard and others through its legislative efforts.[3] The Consumer Financial Protection Bureau, which is currently engaged in rulemaking under the FDCPA, has recognized the Program as an "industry best practice."[4]

The Program certification standard permits certified companies to request payment of a debt after the debt's applicable statute of limitations has expired, but prohibits a civil lawsuit, even if state law would revive the limitations period.[5] As we explain below, the standard is consistent with state law permitting continued collection activities.

Petitioner Midland Funding, LLC ("Midland") has been certified by the Program since March of 2016 under certification number C1312-1009(2).

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[3] DBA International's Certification Program was recognized by a resolution of the Michigan State Senate as "exceed[ing] state and federal laws and regulations through a series of stringent requirements that stress responsible consumer protection through increased transparency and operational controls . . . " Michigan SR-33 (March 26, 2015) publicly available at http://tinyurl.com/zpx65kh.

[4] Consumer Financial Protection Bureau, "Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking, Outline Of Proposals Under Consideration and Alternatives Considered," p. 38 (July 28, 2016) publicly available at http://tinyurl.com/hotbmyb.

[5] As Petitioner's brief points out, only two states are known to have statutes of limitations that extinguish the underlying debt, Wisconsin and Mississippi, while the remaining jurisdictions only bar the remedy of a judgment. Petitioner's Brief, pp. 17-18.

Because DBA International's debt buying company members can become subject to the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. ("FDCPA"), judicial interpretations of the FDCPA substantially impact certified companies like Midland. When those interpretations produce absurd results, the interests of DBA members can be materially, adversely affected.

Such is the case here.

DBA International supports Petitioner's position in this matter. The court below correctly held that the debt owed to Midland by Respondent Aleida Johnson constituted a claim under the Bankruptcy Code because applicable Alabama law permitted Midland to continue to collect the debt following the expiration of the applicable limitations period.

However, the court below was incorrect to hold that Midland violated the FDCPA because the filing of a proof of claim in Respondent's Chapter 13 case is similar to filing a civil lawsuit. The holding is inconsistent with the purposes of the FDCPA and the Bankruptcy Code. As discussed more fully below, debts that may be subject to expired limitations periods are still property rights and can be lawfully collected. The commencement of a Chapter 13 case is a judicial proceeding adverse to those property rights and debt buying companies must be afforded due process, by being permitted to file a proof of claim without the risk of liability and being afforded an opportunity to be heard,

before they are stripped of their property rights. Prohibiting debt buying companies who hold such debts from participating in Chapter 13 cases is counter to the Bankruptcy Code's aim of encouraging creditor participation. It also leads to the absurd result that such debts will not be discharged upon the completion of a Chapter 13 case, a result inconsistent with the Bankruptcy Code's purpose of providing consumers with a "fresh start."

DBA urges this Court to find that the FDCPA does not impose liability on debt buying companies who have a right under state law to request payment and file proofs of claim in bankruptcy cases to protect their property interests.

SUMMARY OF ARGUMENT

Every circuit court that has considered the issues now before the Court, including the court below, has found that a debt potentially barred by a state statute of limitations represents a "claim" under the Bankruptcy Code. Only the Eleventh Circuit, however, holds that a creditor holding such a claim can violate the FDCPA by participating in a Chapter 13 case. The error of the Court Below is that its holding deprives creditors of due process and prevents debtors from receiving the "fresh start" they receive at the end of a successful Chapter 13 case.

A. The FDCPA regulates the conduct of debt collectors, but avoids regulating the debt they collect.

It neither extinguishes nor impairs debt. Thus, the FDCPA does not prohibit collecting a debt subject to an expired statute of limitations. Such debts have value and creditors who hold them have a valid property right.

B. Because creditors can continue to request payment on such debts, the Bankruptcy Code treats these debts as claims. Once a Chapter 13 case is initiated, a creditor is automatically stayed from pursuing payment of its claims. If the Chapter 13 case provides for treatment of a claim, the claim is discharged at the conclusion of a successful Chapter 13 case. Thus, the Chapter 13 process strips creditors of their contract rights.

C. In order to provide necessary due process, creditors must be afforded the opportunity to participate in Chapter 13 cases. The FDCPA cannot be read to make it unlawful for creditors to exercise their due process right to participate in a judicial proceeding which will strip them of their property rights.

D. However, when a creditor does not receive due process in a Chapter 13 case, the Bankruptcy Code will except the creditor's claim from discharge. Thus, even if a debtor schedules a claim in her Chapter 13 case, the claim cannot be discharged when the creditor is prohibited from participating in the bankruptcy process. Thus, the Bankruptcy Code is designed to encourage creditor participation so that all claims, no matter how remote, are ultimately discharged. Creditor participation also benefits consumers who inadvertently

forget to schedule debts in their Chapter 13 cases because unscheduled claims are not discharged in Chapter 13 cases. If the FDCPA is violated when creditors participate in cases where they possess a valid claim, as the Court Below held, creditors will certainly not participate in the Chapter 13 process. The result is claims will not be discharged that would otherwise be discharged if the Bankruptcy Code were permitted to operate as intended.

E. The Chapter 13 claims process contemplates creditors filing claims for debts subject to expired statutes of limitations. These claims are routinely "disallowed," meaning they are not paid. But when a claim is disallowed it also means it can be discharged at the conclusion of the Chapter 13 case. The Chapter 13 claims process works because it provides creditors due process and allows debtors, trustees and creditors to object to claims for a variety of reasons. Honest creditors participate in the process even when their claims are subject to disallowance because it brings finality to both the creditor and its debtor.

F. Thus, the Chapter 13 claims process bears little resemblance to a collection lawsuit. The Chapter 13 case is *adverse* to creditor's rights and seeks to extinguish those rights on terms determined by the debtor and the Bankruptcy Code. The debtor voluntarily initiates the Chapter 13 case and the end result is to free the debtor from her obligation to the creditor. Collection lawsuits are adverse to debtors, seek judgment based on the debt contract and, if they result in a judgment, can cause involuntary executions over

which the debtor has little control. The purpose of the claims process is not to enforce debts, but to provide treatment of claims, even those that can be disallowed, so that due process is satisfied and debtors can achieve a fresh start.

ARGUMENT

All but one of the circuit courts to have considered the issue of whether filing a bankruptcy proof of claim asserting potentially time-barred debt violates the FDCPA have held that it does not. See *Owens v. LVNV Funding, LLC*, 832 F.3d 726 (7th Cir. 2016); *Dubois v. Atlas Acquisitions LLC*, 834 F.3d 522 (4th Cir. 2016); *Nelson v. Midland Credit Mgmt., Inc.*, 828 F.3d 749 (8th Cir. 2016). Only the Eleventh Circuit has reached a different result. See *Johnson v. Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016); *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

In the case now before the Court, the Eleventh Circuit agreed with the other circuit courts that a debt subject to an expired limitations period is a "claim" within the meaning of 11 U.S.C. § 101(5) of the Bankruptcy Code. *Johnson v. Midland Funding, LLC*, 823 F.3d at 1338-39. ("So although a party may not be able to enforce its claim because of a statute-of-limitations bar, that party still may assert the claim in the first place."). In doing so, the *Johnson* court added that the holder of a claim possesses a "right to payment," and the expiration of the state statute of

limitations (under Alabama law here) only potentially bars a judgment, but not the right to collect the claim through other means. *Id.*, at 1338. See also *Dubois*, 834 F.3d at 529; *Owens*, 832 F.3d at 731. Thus, although the claim may ultimately be disallowed in the Chapter 13 claims process, a creditor holding such a claim can participate in a debtor's Chapter 13 case. *Johnson*, 823 F.3d at 1338-39.

However, its decision to make it *unlawful* under the FDCPA for a creditor holding a *lawful* claim to participate in the Chapter 13 claims process (as intended by the Bankruptcy Code) creates an untenable result: a creditor's exercise of its due process rights also causes it to violate the FDCPA. The Eleventh Circuit's decisions on this issue have created a procedural framework through which creditors holding potentially time-barred claims must either allow the bankruptcy court to deprive them of property interests without objection, or risk civil liability for exercising their constitutional right to be heard.

DBA International urges the Court to reject the Eleventh Circuit's position and adopt the decisions of the vast majority of other circuits that have considered this issue and correctly applied the law.

A. Because Debts Subject to Expired Limitations Periods are Permissible to Collect Under the FDCPA, They Are Property Rights

Under Alabama law applicable here, even if the statute of limitations applicable to the debt at issue expired, it would not serve to extinguish the debt. *Johnson*, 823 F.3d at 1338-39. Therefore, in order to afford debtors relief from payment of such debts, the Bankruptcy Code contemplates the filing of claims subject to expired limitations periods. *Id.*, at 1338; *Dubois*, 834 F.3d at 530.

Debt buying companies may sometimes be subject to the FDCPA. See *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1316 (11th Cir. 2015); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2000). However, the FDCPA does not alter state law treatment of their debt and does not extinguish it. *Shimek v. Forbes*, 374 F.3d 1011, 1013 (11th Cir. 2004) (*per curiam*) citing *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997). See also *Vitullo v. Mancini*, 684 F. Supp. 2d 760, 765 (E.D. Va. 2010) (finding the FDCPA contained no provision to cancel or extinguish a debt). Thus, the FDCPA does not regulate debts, only the conduct undertaken by debt collectors in collecting debts. *Simon v. FIA Card Services, N.A.*, 732 F.3d 259, 274 (3d Cir. 2013).

Since debts are not impaired, the FDCPA does not prohibit debt collectors from continuing their efforts to collect debt subject to an expired state statute of limitations. *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d

28, 32-33 (3d Cir. 2011); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014).

Because debts, like that at issue here, continue to be lawfully collected after the expiration of any applicable limitations period, they continue to possess monetary value to creditors, even to creditors subject to the FDCPA. *Glenn v. Cavalry Invs. LLC (In re Glenn)*, 542 B.R. 833, 847 (Bankr. N.D. Ill. 2016).

B. The Claims Process "Encourages" Creditors to Participate Because It Materially Impairs if Not Destroys Their Contract Rights in Their Debts

Once a debtor initiates her bankruptcy action under Chapter 13, the Bankruptcy Code prohibits any collection efforts by her creditors by operation of the automatic stay. See 11 U.S.C. § 362(a). The Bankruptcy Code's automatic stay "is one of the fundamental debtor protections supplied by the bankruptcy code." *In re University Medical Center*, 973 F.2d 1065, 1074 (3d Cir. 1992), citing *In re Atlantic Business & Community Corp.*, 901 F.2d 325, 327 (3d Cir. 1990).

In this case, once Respondent filed her Chapter 13 petition, the automatic stay immediately prohibited any effort by Petitioner to exercise its state law right to collect the debt. Notably, § 362(a) is broad and is applicable to "all entities," and Petitioner's collection activities would have been stayed even if Respondent had omitted Petitioner's debt from her bankruptcy filings. See *In re Mann*, 22 B.R. 306, 309 (Bankr. E.D.

Pa. 1982) (finding that creditor violated § 362(a) even though it had no notice of the debtor's bankruptcy filing.).

Upon invoking Chapter 13 protections, a creditor's claims are relegated to the bankruptcy claims process under 11 U.S.C. § 501, regardless of whether those claims are cognizable in a state court lawsuit. See *Dubois*, 834 F.3d at 530; *Owens*, 832 F.3d at 731; *In re Clark*, 91 B.R. 324, 338 (Bankr. E.D. Pa. 1988) (citing and collecting cases).

In addition to the stay, at the conclusion of a Chapter 13 case, the debtor receives a discharge of all debts provided for in the plan. 11 U.S.C. § 1328(a). The discharge at the plan's conclusion bars any further collection efforts, whether via lawsuit or otherwise. *Id.*

Using the hammer of § 362(a) and the anvil of the discharge injunction, the Bankruptcy Code "encourages participation of all interested parties on issues relevant to the debtor." *Norris Square Civic Ass'n v. Saint Mary Hosp.*, 86 B.R. 393, 399 (Bankr. E.D. Pa. 1988) (citations omitted); *Dubois*, 834 F.3d at 531 (quoting 1 Norton Bankr. L. & Prac. § 3:9 (3d ed. 2016)); *Owens*, 832 F.3d at 732. See also *Zotow v. Johnson (In re Zotow)*, 432 B.R. 252, 261 (B.A.P. 9th Cir. 2010) (noting that because § 362 causes collection efforts to cease, it acts to "control creditor action by encouraging creditors to participate in the bankruptcy process to resolve their claims").

This "encouragement" is anything but subtle. A willful violation of the stay is punishable by sanctions. See 11 U.S.C. § 362(k).

But the Bankruptcy Code is also mindful that the automatic stay and discharge are adverse to creditor's state law rights and alleviates the detrimental impact by allowing creditors to participate in the bankruptcy claims process. *United States by & Through IRS v. Hairopoulos (In re Hairopoulos)*, 118 F.3d 1240, 1244 (8th Cir. 1997). See also *In re Martinez*, 51 B.R. 944, 947 (Bankr. D. Colo. 1985) (noting that Chapter 13 proceedings are subject to the Due Process Clause and that creditors should have the "opportunity to protect their interests.").

C. Because Chapter 13 Cases Materially Impair Creditors' Rights, They Must Be Permitted to Participate in the Claims Process

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . deprived of . . . property[] without due process of law." U.S. Const., amend. V. "Procedural due process imposes constraints on governmental decisions which deprive individuals of . . . property interests within the meaning of the Due Process Clause of the [Fifth Amendment]." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal quotations omitted). "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 333.

1. Chapter 13 Cases Implicate the Property Rights of Holders of Claims

In the bankruptcy context, this Court has held "that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights." *New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 297 (1953).

Because a Chapter 13 case will deprive creditors of their property rights, creditor participation in bankruptcy proceedings is uniformly recognized. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272, 130 S. Ct. 1367, 1378 (2010) (Creditor's due process rights not violated where it had actual notice of Chapter 13 plan in time to object to treatment of its claim). The Third Circuit has recognized due process as "a concept rooted in fairness and applicable to bankruptcy through the Fifth Amendment." *Wright v. Owens Corning*, 679 F.3d 101, 107 n.6 (3d Cir. 2012). According to the Third Circuit, "[d]ue process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 108 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). At a minimum, due process should require that creditors be allowed to file proofs of claim to assert their rights to payment. Cf. *Republic Nat'l Bank v. Crippen*, 224 F.2d 565, 565-66 (7th Cir. 1955) (denying creditors in Chapter 11 bankruptcy hearing to present evidence on their proofs of claim constituted "denial of due process which is never harmless error"). Circuit

courts are uniform in their understanding that creditors cannot be divested of their property rights absent adequate notice and the *opportunity* to participate in the bankruptcy proceeding. See, e.g., *Vicenty v. San Miguel Sandoval (San Miguel Sandoval)*, 327 B.R. 493, 506 (B.A.P. 1st Cir. 2005) (Chapter 13 creditors entitled to due process "[n]otwithstanding strict application of the limits and duties imposed on creditors by the Bankruptcy Code. . . ."); *GAC Enters. v. Medaglia (In re Medaglia)*, 52 F.3d 451, 455 (2d Cir. 1995) (reasonable notice of Chapter 7 proceeding satisfied due process because the creditor was afforded an opportunity to be heard prior to deadline for objections to discharge); *Piedmont Tr. Bank v. Linkous (In re Linkous)*, 990 F.2d 160, 163 (4th Cir. 1993) (Creditor denied due process where notice of Chapter 13 plan did not reasonably apprise creditor of proposal to "cram down" value of secured claim); *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512, 517 (5th Cir. 1994) (Due process provided when creditor had "actual notice" of debtor's Chapter 11 filing in time to file objection); *Lampe v. Kash*, 735 F.3d 942, 943 (6th Cir. 2013) ("A debt is the creditor's property, and the Due Process Clause entitles her to service of notice 'reasonably calculated' to reach her before she is deprived of that property."); *United States by & Through IRS v. Hairopoulos (In re Hairopoulos)*, 118 F.3d at 1244 ("The constitutional component of notice is based upon a recognition that creditors have a right to adequate notice and the opportunity to participate in a meaningful way in the course of bankruptcy proceedings.").

Here, Petitioner – like any other creditor holding a potentially time-barred claim – had a property right that the bankruptcy court could not deprive without affording it the opportunity to be heard. *Glenn*, 542 B.R. at 848 (observing that "to deny such creditor a voice on the issue most directly bearing on the creditor, its claim, is more than problematic"); see, e.g., *New York*, 344 U.S. at 297. As Petitioner's Brief explained in more detail, the running of the statute of limitations under Alabama law – like the law of most states – did not extinguish Petitioner's right to payment notwithstanding the debtor's available affirmative defense in a collections action. Petitioner's Brief, pp. 17-18. Accordingly, the Bankruptcy Code allowed Petitioner to file its proof of claim, which is the procedural mechanism by which Petitioner could exercise its constitutional right to be heard. See 11 U.S.C. § 502.

If the FDCPA is expanded to impose civil liability on debt collectors for exercising their opportunity to be heard in the bankruptcy court, then those debt collectors are either being deprived of property rights without due process or their claims – i.e. their rights to continue seeking payment on the potentially time-barred debt – cannot be subject to the bankruptcy automatic stay or discharge. Neither of these scenarios is consistent with the purposes of the FDCPA or the Bankruptcy Code.

2. Applying the FDCPA to Impose Civil Liability on Debt Collectors for Participating in Bankruptcy Proceedings Unfairly Infringes on Their Due Process Rights and Is Contrary to the Bankruptcy Code

The Eleventh Circuit's opinion below underscores the systemic dissonance created by its own analysis. According to the Circuit Court's opinion: "[W]hile we recognize that creditors can file proofs of claim they know to be barred by the relevant statute of limitations, those creditors are not free from all consequences of filing these claims." *Johnson*, 823 F.3d at 1339. In other words, according to the court below, creditors may exercise their constitutional due process rights to be heard before the bankruptcy court, but a certain subset of those creditors – namely, those that could be subject to the FDCPA – must risk civil liability to do so. *Id.* This formulation simply does not conform to the standard notions of fundamental fairness underlying Fifth Amendment due process protections. See *Wright*, 679 F.3d at 107 n.6.

This is exactly the result of the Eleventh Circuit's reasoning in this matter and in *Crawford*. The Circuit Court's opinion below expressly recognized that "although a party may not be able to enforce its claim because of a statute-of-limitations bar, that party still may assert the claim in the first place." *Johnson*, 823 F.3d at 1338-39. Nevertheless, the Circuit Court maintained that creditors who properly file such a valid claim are subject to civil liability under the FDCPA. *Id.*, at 1339 (citing 15 U.S.C. § 1692k).

Here, Petitioner – like any other creditor – had a property right by virtue of its claim. The Bankruptcy Code details procedures to ensure Petitioner had the opportunity to be heard before its property right was extinguished. See, e.g., 11 U.S.C. § 502. The Bankruptcy Code's claims process is designed to provide creditors due process before they are stripped of their property rights. Imposing civil liability on Midland – or any other creditor – for participating in a proceeding initiated by the Respondent and designed to deprive Midland of its property right is fundamentally unjust.

The FDCPA does not extinguish a creditor's property right to payment of a time-barred debt and the Bankruptcy Code cannot be contorted to do so without providing creditors the opportunity to participate. *Glenn*, 542 B.R. at 847 ("[The] industry has just as clearly relied upon the nature of the time-barred debt discussed above (e.g., the continuing nature of the debt and the ability to accept payment on it). . . . There is no question, therefore, that Cavalry's property rights are protected by the Fifth Amendment.")

Similarly, the Circuit Court's recognition that the FDCPA provides a safe harbor for debt collectors who act in good faith is entirely irrelevant in the context of the deprivation of an existing property right. The very existence of the claim recognizes the existence of a property right and Midland must be afforded due process before its right is extinguished. Even the Eleventh Circuit recognizes that the Bankruptcy Code allows creditors to file proofs of claim on potentially time-barred debts. See *Johnson*, 823 F.3d at 1338-39. Every

proof of claim filed on a potentially time-barred debt, which is accurate and in conformance with the Bankruptcy Code and Rules – whether filed by a debt collector or any other creditor – is necessarily filed in good faith. The Bankruptcy Code specifically contemplates such claims and encourages the filing of proofs of claim upon them to satisfy fundamental due process before a creditor can be stripped of its property right. The FDCPA does not diminish the due process protections provided to creditors by the Bankruptcy Code or any other law and cannot be interpreted as allowing such an absurd result.

D. Imposing FDCPA Liability for Filing Potentially Time-Barred Proofs of Claim Is at Odds With the Claims Process and Implicates Larger Systemic Concerns Which Ultimately Interfere With the Bankruptcy Code's "Fresh Start" Policy

The dilemma created by *Johnson* for Midland and similar creditors can be framed by considering the effect of prohibiting such creditors to participate in the bankruptcy claims process. The Third Circuit has addressed this larger system concern, finding that when a creditor is denied participation in a bankruptcy case, the creditor's claim cannot be discharged. *Wright*, 679 F.3d at 107 n.6, citing *Jones v. Chemetron Corp.*, 212 F.3d 199, 209 (3d Cir. 2000).

The court below failed to consider the larger systemic impact of its decision and the consequences of

making it unlawful for creditors to participate in Chapter 13 cases. If the FDCPA is applied to make it unlawful to file proofs of claim for debts that are simply subject to a state law defense but are otherwise collectable under state law, then the very purpose for which consumers seek protection under Chapter 13 is imperiled.

1. Prohibiting Creditor Participation Results in Valid Claims Not Being Discharged

A debt owed to a creditor who is denied the opportunity to participate is not discharged.[6] *Owens*, 832 F.3d at 732; *Jones v. Chemetron Corp.*, 212 F.3d at 209. The purpose of the Bankruptcy Code, to provide debtors with a fresh start, " . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt," is defeated. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Yet that is the result of the Eleventh Circuit's ruling below and in *Crawford* and the perilous situation the two decisions have created for consumers and creditors. There is simply no just way to prohibit creditors who hold claims from participating in a debtor's Chapter 13 bankruptcy without saving the claims from discharge.

The conduct here is not offensive to the FDCPA. It does not prohibit collection of time-barred debts and

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[6] The only exception is in "no-asset" Chapter 7 cases. See generally *Judd v. Wolfe*, 78 F.3d 110, 115 (3d Cir. 1996).

does not extinguish them. The Code encourages creditors to participate and file their claims so it can discharge the debts owed them and provide the "honest but unfortunate debtor" relief from the very claims that caused them to seek Chapter 13 protection in the first place. *Local Loan Co.*, 292 U.S. at 244.

Finding that the filing of proofs of claim on such debts violates the FDCPA will deprive creditors from participation in the claims process. The result is that these claims cannot and will not be discharged. It is an absurd result contrary to the purpose of the Bankruptcy Code and the debtor's desire to be free from debt collection activity. See *Jerman v. Carlisle*, 559 U.S. 573, 600 (2010) (recognizing that the FDCPA "should not be assumed to compel absurd results").

2. Barring Creditor Participation Harms Debtors Because Unlisted Claims Are Not Discharged Under Chapter 13

The lasting effect of *Crawford* and *Johnson* is to discourage creditor participation in the Eleventh Circuit, but the result does not benefit Chapter 13 debtors especially when the debtor fails to list the claim in her bankruptcy petition.

In a Chapter 13 case, a claim which is not scheduled or listed by the debtor and for which no proof of claim is filed, is not discharged. See 11 U.S.C. § 1328(a); see also *Dilg v. Greenburgh*, 151 B.R. 709, 716 (Bankr. E.D. Pa. 1993) ("The reasoning employed by the foregoing cases make it clear that an omitted creditor,

who receives no notice of any significant events in a Chapter 13 case, will not have the debt owed to that creditor discharged.").

This harsh result occurred in *In re Kristiniak*, 208 B.R. 132 (Bankr. E.D. Pa. 1997). There, debtors in a Chapter 13 case made the "honest mistake" of omitting an unsecured creditor, Household Finance Consumer Discount Co. ("HFC") from their Chapter 13 filings. The debtors' Chapter 13 plan was confirmed on February 17, 1994. Three years later, Reed Investors Corporation ("Reed"), as successor to HFC moved for relief from the automatic stay to collect the omitted debt, a revolving loan HFC had made to the debtors in 1985. The husband-debtor admitted that it appeared he and his co-debtor wife executed the loan agreement, but they had no recollection of the loan or the purpose for which it was obtained. *Id.*, at 133.

Because the burden of demonstrating a creditor's knowledge is on the debtors and the bankruptcy court found no basis to believe Reed knew of their case, the debtors proposed to remedy their honest omission by amending their plan to include Reed. *Id.* This solution was not available because under the applicable circuit law, the bar date to file a claim in a Chapter 13 case cannot be extended by the court. *Id.* at 134, citing *In re Vertientes, Ltd.*, 845 F.2d 57 (3d Cir. 1988). Rather, as an omitted creditor that did not receive notice of the case, Reed's debt was not discharged. *In re Kristiniak*, 208 B.R. at 135. The court reached this conclusion even though it had concerns that the debt owed to Reed was time-barred. *Id.*

In re Kristiniak is no outlier, and numerous courts cite it as authority for holding that omitted creditors in Chapter 13 may proceed to collect their unscheduled debts because they have not been discharged. *In re Nwonwu*, 362 B.R. 705, 710 (Bankr. E.D. Va. 2007) ("Although such creditors are not entitled to share in the distribution from the estate, they may enforce their claims after the conclusion of the case or, if they obtain relief from the automatic stay, even while the case is pending."); *In re Windom*, 284 B.R. 644, 647 (Bankr. E.D. Tenn. 2002) (same); *In re Morris & Johnnie Fugate*, 286 B.R. 778 (Bankr. N.D. Cal. 2002) (denying debtors' motion to file a late claim).

Creditors can and do file proofs of claim even when their claims are not listed or scheduled by Chapter 13 debtors. Such was the case in *Dubois*. *Dubois*, 834 F.3d at 525 ("Dubois did not list the debt on her bankruptcy schedules nor did she send a notice of bankruptcy to Atlas."). Thus, the creditor's filing of a proof of claim in *Dubois* only furthered the purpose of the Bankruptcy Code because it afforded the debtor a discharge of a debt she inadvertently omitted. *Id.*, at 531. ("Clearly, then, when a time-barred debt is not scheduled the optimal scenario is for a claim to be filed and for the Bankruptcy Code to operate as written."). Not scheduling a debt still subjects the creditor to the automatic stay of § 362(a), so an honest creditor (and one who would rather not wait for a Chapter 13 plan to complete itself in three to five years) would want to participate. Perhaps the claim will be allowed and partially paid – perhaps it will be disallowed, but at least there

will be finality for all concerned through discharge at the completion of a successful Chapter 13 plan.

Allowing debt collectors to file proofs of claim for potentially time-barred debts also furthers the purposes of the FDCPA. The FDCPA's stated purpose is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

In the bankruptcy context, this purpose is well served by the automatic stay imposed on creditors upon the filing of a bankruptcy petition. See 11 U.S.C. § 362(a). However, if creditors are deprived of their right to be heard in the bankruptcy process, the bankruptcy court's jurisdiction is called into question, along with the court's ability to enforce the Code's automatic stay. See *In re Smith Corset Shops*, 696 F.2d 971, 976-77 (7th Cir. 1982) (automatic stay not violated where debtor enticed creditor into violation to enable debtor to successfully sue creditor for conversion, because "equitable and due process considerations apply in the exercise of bankruptcy jurisdiction"), discussing *Bank of Marin v. England*, 385 U.S. 99 (1966) (superseded by amendment to Bankruptcy Code).

Moreover, this Court has also recognized the FDCPA's "apparent objective of preserving creditors' judicial remedies." *Heintz v. Jenkins*, 514 U.S. 291, 296 (1995). The objective to preserve creditors' judicial

remedies, the Act's consumer protection purpose, and the Bankruptcy Code's "fresh start" goals are all best served by allowing creditors to file proofs of claim -- even when the debts represented by those proofs of claim are potentially subject to a state law statute of limitations defense.

E. Creditor Participation Benefits Debtors and Creditors – the Claims Process Is Not "Broken." Claims Subject to Disallowance Are Still Claims

The existence of a claim does not necessarily entitle a creditor to payment on that claim. Pursuant to 11 U.S.C. § 501(a), a creditor may file a proof of claim. The Federal Rules of Bankruptcy Procedure governing the filing of proofs of claim provides that filing a proof of claim consistent with the Rule constitutes prima facie evidence of the validity and amount of the claim. See Fed. R. Bankr. P. 3001. Thereafter, claims are either allowed or disallowed pursuant to 11 U.S.C. § 502. A debtor can object to the claim on the basis that the claim is subject to a state law defense, like an expired limitations period. See 11 U.S.C. § 502(b)(1) (a claim may be disallowed if it is unenforceable against the debtor under any agreement or applicable law).

The claims objection process is nothing new to the Bankruptcy Code and has long been a part of bankruptcy jurisprudence. See, e.g., *Keeler v. PRA Receivables Mgmt., LLC (In re Keeler)*, 440 B.R. 354, 361-63 (Bankr. E.D. Pa. 2009) (discussing the claims process

under both the Bankruptcy Act of 1898 and the present Bankruptcy Code). The United States Bankruptcy Court for the Eastern District of Pennsylvania recently noted that "[w]ith some frequency, claims are disallowed upon objection because they are unenforceable under applicable nonbankruptcy law due to the expiration of the statute of limitations." *In re Umstead*, 490 B.R. 186, 195 n.12 (Bankr. E.D. Pa. 2013). Because such claims are disallowed "with some frequency," the claims process is functioning as Congress intended.

If a claim is subject to disallowance because of a state law defense (even one that is "iron-clad"), it does not mean that the creditor should not or cannot file the claim. Section 502(b)(1) contemplates such filings and provides for the disallowance of claims that are "unenforceable against the debtor or property of the debtor . . . under applicable law." 11 U.S.C. § 502(b)(1). See also *Dubois*, 834 F.3d at 530; *Owens*, 832 F.3d at 732. Claims that are subject to the defense of an expired limitations period fall squarely into § 502(b)(1). *In re Freeman*, 540 B.R. 129, 136 (Bankr. E.D. Pa. 2015). See also *In re Edge*, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986) ("That a claim is not allowable because a statute of limitation has expired does not defeat the existence of the claim in bankruptcy.").

A larger systemic concern comes to a head here. The "fresh start" goal of Chapter 13 is defeated if creditors are prohibited from filing proofs of claim. If a debtor fails to schedule a forgotten, potentially time-barred debt but completes her Chapter 13 plan, the potentially time-barred debt will not be

discharged. A Chapter 13 discharge order only discharges "all debts provided for by the plan or disallowed. . . ." 11 U.S.C. § 1328(a) (emphasis added). This interpretation comports with the Code's desire that the holders of all claims have the opportunity to participate and satisfy the due process necessary to cause their rights against the debtor to be discharged.

Whether a claim will be "allowed," or is free from objection is expressly not what determines the existence of a claim for the purposes of claim filing and discharge. "[G]iven Congress' intent that 'claim' be construed broadly, we do not believe that Congress intended the bankruptcy courts to use the Code's definition of 'claim' to police the Chapter 13 process for abuse." *Johnson v. Home State Bank*, 501 U.S. 78, 88, 111 S. Ct. 2150, 2156 (1991). Rather, the Bankruptcy Code's intention is to encompass, as broadly as possible, whatever constitutes a right to payment, provide for its treatment in the claims process, stay collection of it under § 362 and ultimately discharge it under § 1328. Whether the claim will be allowed is of no consequence to the Chapter 13 claims process – it is the existence of the claim and its inclusion in the case which is the overriding concern.

F. The Claims Process Bears No Resemblance to a State Court Collection Lawsuit

Notably, unlike a creditor-initiated state court lawsuit, the bankruptcy claims process is triggered by

the debtor's filing of her bankruptcy petition. The commencement of a bankruptcy case automatically invokes protections for debtors that are adverse to creditor's state-law rights. See, e.g., 11 U.S.C. § 362(a). By participating in a Chapter 13 case, a creditor submits itself to the bankruptcy process that may allow or disallow its claim and ultimately lead to the discharge of the obligation owed to it. *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1249 (3d Cir. 1994). At the conclusion of a successful Chapter 13 plan, a creditor does not leave with a judgment allowing it to enforce its debt through involuntary executions against the debtor. Instead it leaves with an order permanently enjoining it from any effort to collect the debt it submitted under its proof of claim.

In the context of the constitutional due process concerns implicated by imposing FDCPA liability for filing a potentially time-barred proof of claim, the debtor in a bankruptcy proceeding is obtaining relief against the creditor, not the other way around. If a debt collector filed a state court collection action, the debt collector could not obtain a judgment against the debtor without the debtor receiving notice and an opportunity to be heard. See, e.g., *Mullane*, 339 U.S. at 313 (minimal requirement for depriving property by adjudication includes "opportunity for hearing appropriate to the nature of the case"). In fact, this due process right is what ensures debtors can appear and assert applicable state law defenses such as the statute of limitations.

Likewise, if a debtor initiates a bankruptcy proceeding, the impacted creditors – including impacted debt collectors – must be allowed to appear and assert their rights to payment. The same due process rights that protect debtors also protect debt collectors. See *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as the denial of the equal protection of the laws."). Applying the FDCPA to punish debt collectors for participation in bankruptcy proceedings designed to deprive their property rights violates due process.

CONCLUSION

For these reasons, DBA respectfully requests that the Court reverse the Circuit Court's decision below finding the FDCPA is violated when a debt collector files a proof of claim representing a debt subject to an expired state statute of limitations.

Respectfully submitted,

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MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR NARCA - THE NATIONAL CREDITORS BAR ASSOCIATION™ AND MARYLAND/DC CREDITORS BAR ASSOCIATION, INC., MISSOURI CREDITORS BAR, INC., KENTUCKY CREDITORS RIGHTS BAR ASSOCIATION, INC., OHIO CREDITOR'S ATTORNEYS ASSOCIATION, NEW YORK'S CREDITORS' BAR ASSOCIATION, FLORIDA CREDITORS BAR ASSOCIATION, PENNSYLVANIA CREDITORS' BAR ASSOCIATION, ILLINOIS CREDITORS BAR ASSOCIATION, ARIZONA CREDITOR BAR ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) 17

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Cited Authorities

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Rowland v. California Men's Colony,
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Toibb v. Ratliff,
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OTHER AUTHORITIES

American Bar Association, Formal Opinion 68 (1932) 12

Office of the United States Trustee, FY-2015 Trustee Audited Annual Reports, accessed at https://www.justice.gov/ust/private-trustee-data-statistics/chapter-13-trustee-data-and-statistics. 8

The Consumer Bankruptcy Fee Study: Final Report, 20 AM. BANKR. INST. L. REV. 17 (Spring 2012), Table A-2 9

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

NARCA – The National Creditors Bar Association™ is a nationwide, not-for-profit trade association of attorneys who represent creditors in debt collection matters. NARCA's members include over 500 law firms, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by NARCA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of pertinent laws and regulations.

Florida Creditors Bar Association, Illinois Creditors Bar Association, Maryland/DC Creditors Bar Association, Inc., Missouri Creditors Bar, Inc., Kentucky Creditors Rights Bar Association, Inc., New York's Creditors' Bar Association, Ohio Creditor's Attorneys Association, Pennsylvania Creditors' Bar Association, and Arizona Creditor Bar Association, Inc. are state-level, not-for-profit professional associations of attorneys and law firms engaged in the practice of debt collection law. The members of these organizations must meet their associations' standards, which are designed to ensure professionalism and ethics. All are also governed by the ethical obligations of their respective state bars and attorney disciplinary programs.

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1. As provided for in U.S. SUP. CT R 37(6) the *Amici* state that: (a) no party's counsel authored this brief in whole or in part; no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and (c) no person—other than the *Amici Curiae*, their members, and their counsel—contributed money to fund the preparation or submission of this brief. The parties have filed blanket consents.

NARCA members are regularly involved in the lawful collection of past-due consumer debts and must therefore interpret and apply the often-unsettled requirements of applicable collection law, principally the Fair Debt Collection Practices Act (FDCPA or Act), Pub. L. No. 95-109, 91 Stat. 874 (1977). NARCA has a strong interest in ensuring that the Act is interpreted in a way that allows collection attorneys to discharge their ethical duty to advance their clients' legitimate interests—within the bounds of existing law—without constantly exposing themselves to substantial personal liability. NARCA has participated as *amicus curiae* in other cases involving the interpretation or application of the Act. *See, e.g., Heintz v. Jenkins*, 514 U.S. 291 (1995); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 US 573 (2010); *Marx v. General Revenue Corp.*, 568 U.S. 2 (2013); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

NARCA and the state creditors' bar associations share common cause, as their members are regularly engaged by creditors to collect delinquent consumer debts. In collecting lawfully, their attorney members must interpret and comply with federal and state laws governing debt collection, including the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (the "FDCPA" or the "Act"). As the only national bar group dedicated solely to the needs of consumer collection attorneys, NARCA has a significant interest in ensuring that the FDCPA is interpreted in a manner that allows collection attorneys to discharge their ethical duties of competence and diligence in advancing their clients' legitimate interests. Similarly, the state associations, as the respective leading state trade associations for consumer collection attorneys, have a significant interest in ensuring that the FDCPA is

interpreted in a manner that allows collection attorneys to discharge their ethical duty to zealously and lawfully advance their clients' legitimate interests.

The ruling underlying this appeal erroneously (and unfairly) exposes the attorney and law firm members of the *Amici*, and many clients of those members, to individual and class action claims under the FDCPA. The *Amici* have a direct interest in this litigation. Their organizations have authorized the filing of this brief

SUMMARY OF ARGUMENT

Lower courts have held that requesting payment of a time-barred debt dos not violate the FDCPA, but suing on such a debt does. The outcome reached by the Eleventh Circuit Court of Appeals requires equating bankruptcy proofs of claim with lawsuits. The *Amici* argue that proofs of claim are not complaints; however, if they are, they are protected by the Petition Clause of the First Amendment.

The *Amici* further argue that the Court should reject treatment of proof of claim as the equivalent of pleadings so as to satisfy the canon of constitutional avoidance. They further argue that such an approach is desirable because equating lawsuits (which must be filed by lawyers) with proofs of claim (which may be filed by lay persons) diminishes the role of attorneys and the profession of law.

Finally, the *Amici* argue that the Court should resolve the problems that lower courts have created by reading into the FDCPA provisions that are not present, and hold that the Act does not forbid suits on stale debts.

ARGUMENT

INTRODUCTION

The FDCPA is silent as to the collection of time-barred debts. The concept that collection of a time-barred debt might violate the FDCPA has its roots in *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987). The *Kimber* court held that a debt collector violates the FDCPA when it sues, without a prior determination of timeliness, on a debt for which the statute of limitations has expired.

> Kimber claims that FFC's filing of the lawsuit against her violated § 1692f. That section states simply that, "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." Kimber argues that filing a lawsuit to collect on a debt that appears time-barred, without first determining after a reasonable inquiry that the limitations period is due to be tolled, constitutes an unfair and unconscionable practice offensive to § 1692f. The court agrees with Kimber.

Id. at 1487. Later courts expanded upon *Kimber*, concluding that the FDCPA does not prohibit a request for payment of a time-barred debt that is not accompanied by a suit or threat of suit. *See Freyermuth v. Credit Bureau Servs.*, 248 F.3d 767, 771 (8th Cir. 2001); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000); *Johnson v. Capital One*, No. SA-00-CA-315-EP, 2000 U.S. Dist. LEXIS 13311, 2000 WL 1279661, *1 (W.D. Tex. 2000).

Although the FDCPA permits a request for payment that is unaccompanied by a suit or threat of suit, the Eleventh Circuit Court of Appeals treats the filing of a bankruptcy claim as the equivalent of a suit or court complaint and not as a request for payment. As is addressed below, proofs of claim are not complaints, but even if they were, they are subject to First Amendment protections. Thus, this Court should reverse the decision of the court below and hold that the FDCPA does not prohibit the filing of a proof of claim on a time-barred debt.

I. PROOFS OF CLAIM ARE NOT COMPLAINTS

While filing a proof of claim and filing a lawsuit to collect a consumer debt both involve filing legal papers, this is where the similarity ends. When a creditor files suit against a consumer, it initiates the action with a complaint, one of the documents classified as a pleading under FED. R. CIV. P. 7(a). Service of the complaint and summons compels the debtor to respond, or face the loss of legal and economic rights. By contrast, when a debtor files for Chapter 13 bankruptcy, she is initiating an action against her creditors, in which she invites them, but does not obligate them, to file proofs of claim. The claims are paid out of the property of the estate, which is administered by an independent trustee. Proofs of claim require no response from the debtor, who is protected both by her own counsel and the independent trustee. No contested matter is initiated, nor is a contested issue adjudicated unless the debtor or a trustee objects to the claim. Thus, a proof of claim is a component of a system designed to afford relief *to* debtors, while a collection suit is intended to enforce rights *against* debtors. The Bankruptcy Rules define a proof of claim in a way that makes it clear that

it is neither a pleading nor a suit: "A proof of claim is a written statement setting forth a creditor's claim." FED. R. BANKR. P. 3001(a).

Most bankruptcy filings are initiated by a voluntary petition. 11 U.S.C. § 301. All Chapter 13 proceedings are the result of voluntary filings because the statute authorizing involuntary petitions, 11 U.S.C. § 303(a), does not authorize involuntary petitions under Chapter 13. *Toibb v. Ratliff*, 501 U.S. 157, 166 (1991). Thus, all Chapter 13 cases begin at the debtor's request.

Chapter 13 of the Bankruptcy Code allows a debtor to propose a plan for the repayment of a portion of her debts out of future income.

> Chapter 13 of the Bankruptcy Code provides bankruptcy protection to "individual[s] with regular income" whose debts fall within statutory limits. (citation omitted). Unlike debtors who file under Chapter 7 and must liquidate their nonexempt assets in order to pay creditors, (citation omitted), Chapter 13 debtors are permitted to keep their property, but they must agree to a court-approved plan under which they pay creditors out of their future income (citation omitted). A bankruptcy trustee oversees the filing and execution of a Chapter 13 debtor's plan. (citation omitted).

Hamilton v. Lanning, 560 U.S. 505, 508 (2010).

When a debtor files bankruptcy, an estate is created consisting of "all legal or equitable interests of the debtor

in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). In a Chapter 13 bankruptcy, the property of the estate also includes property acquired by the debtor after the filing of the petition and "earnings from services performed by the debtor after the commencement of the case." 11 U.S.C. § 1306. The creation of the estate is significant: payments under the plan come from the debtor's estate rather than directly from the debtor.

To be confirmable, the Chapter 13 plan must "provide for all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C. § 1322(a)(1). The Court may confirm the debtor's plan if it meets several requirements, including that creditors will receive more than they would receive in a proceeding under Chapter 7 and that, if a creditor objects, the value of the property to be distributed is equal to the lesser of the amount of allowed claims or equals "all of the debtor's projected disposable income received in the applicable commitment period." 11 U.S.C. § 1325(a)(4), (b)(1); *see also Hamilton v. Lanning, supra.* A proof of claim is nothing more than a request to participate in the distribution from the bankruptcy estate. "[T]he 'animating purpose' in filing a proof of claim is to obtain payment by sharing in the distribution of the debtor's bankruptcy estate." *Dubois v. Atlas Acquisitions, LLC (In re Dubois)*, 834 F.3d 522 (4th Cir. 2016).

Once a claim is filed, it is the debtor or trustee who decides whether to initiate litigation over the claim. A proof of claim is deemed to be allowed unless a party in interest objects. 11 U.S.C. § 502(a). If an objection is filed, it creates a "contested matter" under FED. R. BANKR. P.

9014. *Pleasant v. TLC Liquidation Trust (In re Tender Loving Care Health Services, Inc.)*, 562 F.3d 158, 162 (2d Cir. 2009).

The Bankruptcy Code imposes upon the trustee the affirmative duty to "examine proofs of claim and object to the allowance of any claim that is improper" but only "if a purpose would be served." 11 U.S.C. § 704(a)(5); 11 U.S.C. § 1302(b)(1). In a case with a small distribution to unsecured creditors, the allowance of a particular claim is likely to have only a *de minimis* effect on other creditors. More importantly, from a consumer protection perspective, the composition of claims allowed, whether current or stale, will often have no effect on the debtor. In order to confirm a Chapter 13 plan, a debtor must pay the lesser of the amount of allowed claims or provide that "all of the debtor's projected disposable income" during the applicable commitment period is to be "applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1). Thus, unless a debtor has sufficient disposable income to pay claims in full, the amount of claims allowed impacts only the distribution of payments among creditors but imposes no burden or loss on the debtor. In most instances, the plan payments will be dictated by the debtor's disposable income and not at all by the amount of the unsecured claims.[2] The debtor pays what she can, it is divided among the unsecured creditors, and the debtor receives a discharge. The stale claim does no harm to the debtor.

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2. During Fiscal Year 2015, 66% of Chapter 13 cases closed paid unsecured creditors less than 40% on their claims, including 13,782 cases in which no amount was paid to unsecured creditors. Office of the United States Trustee, FY-2015 Trustee Audited Annual Reports, accessed at https://www.justice.gov/ust/private-trustee-data-statistics/chapter-13-trustee-data-and-statistics.

Finally, Chapter 13 debtors have more protections than individuals sued for debt collection. First, in the overwhelming majority of Chapter 13 bankruptcies debtors are represented by counsel. According to a study by the Consumer Bankruptcy Project, from 2003-2009, only 2.1%-3.0% of the debtors who filed for Chapter 13 relief did so on a *pro se* basis. Lois Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 69 (Spring 2012), Table A-2. Debtors also have the benefit of an independent Chapter 13 Trustee and active involvement by the court. As one bankruptcy judge (and former Chapter 13 trustee) explained:

> (T)he Court must stress that a Chapter 13 Trustee, who has the fiduciary duty to examine and object to any improper proofs of claim, was appointed in this case. Therefore, in a Chapter 13 bankruptcy, even a debtor or debtor's counsel who chooses not to prosecute claim objections is protected by additional oversight in the form of a trustee. The trustee and/or any party in interest, including the debtor and his creditors, may object to a claim. (citation omitted).
>
> In addition, the claim process, including claims disallowance in Chapter 13 cases, cannot be an abuse of process because the process itself is highly regulated and court controlled. One must only read the Bankruptcy Code and Rules to reach such a conclusion . . . The claims allowance and objection process is under almost constant court oversight. It would be highly difficult, perhaps impossible, to consistently abuse the claims process in a Chapter 13 bankruptcy

> given the scrutiny of the claims process by the debtor, the Chapter 13 Trustee and the bankruptcy court.

Robinson v. JH Portfolio Debt Equities, LLC, 554 B.R. 800, 816 (Bankr. W. D. La. 2016).

Thus, a proof of claim filing in a Chapter 13 case is vastly different in terms of both its nature and impact from the pleadings that initiate debt collection actions. Chapter 13 is a proceeding initiated by the debtor for her own benefit. Filing a claim does not initiate litigation and (in the case of an unsecured creditor such as Midland) usually has no tangible effect on the debtor. Throughout the proof of claim process, the debtor is protected not only by the court, but also by her own counsel and the trustee, both of whom have fiduciary obligations to review claims and protect the debtor's interests. By contrast, a debtor sued on a time-barred debt does not choose when to litigate, must respond in a limited period of time or face legal consequences, and may not have the benefit of counsel, let alone a trustee who is obligated to raise appropriate disputes to the claim.

II. TREATING PROOFS OF CLAIM AS COMPLAINTS BLURS THE DISTINCTION BETWEEN THE ROLE OF LAWYERS AND THE LAY PUBLIC

In ruling that the filing of a proof of claim on a time-barred debt violated the FDCPA, the Courts in *Johnson v. Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016) and *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) relied on FDCPA cases that pertained to suits and threats of suit. However, by equating debt collection

litigation (which must be commenced by an attorney) to the filing of a proof of claim (which is an administrative act that may be performed by a lay person), the Eleventh Circuit decisions have diminished the practice of law.

The administrative nature of a proof of claim eliminates the requirement that a corporate entity act through counsel. Under 11 U.S.C. § 501, a "creditor" may file a proof of claim. A creditor is an entity that holds a claim against the debtor. 11 U.S.C. § 101(10)(A). The claim form may be executed by either the creditor or the creditor's authorized agent, neither of whom need be lawyers. FED. R. BANKR. P. 3001(b). Under FED. R. BANKR. P. 9010(a) a party may appear in a bankruptcy case and perform any act not constituting the practice of law through an agent. The Fifth Circuit Court of Appeals has held that filing claims and ancillary services are administrative functions which do not constitute the practice of law. *State Unauthorized Practice of Law Committee v. Paul Mason & Associates*, 46 F.3d 469, 472 (5th Cir. 1995).

The practice of law has long been held to high standards. Courts may prescribe standards for admission to the bar and prevent the unauthorized practice of law by the lay public. *Leis v. Flynt*, 439 U.S. 438 (1979). While a *pro se* individual may represent herself, a corporation must appear through counsel. *Rowland v. California Men's Colony*, 506 U.S. 194 (1993). It is well established that filing a lawsuit to collect a debt constitutes the practice of law. *Poirier v. Alco Collections*, 107 F.3d 347, 350-51 (5th Cir. 1997).

> [A] lawyer has been given certain privileges by the state. Because of these privileges, letters

> . . . purporting to be written by attorneys have a greater weight than those written by laymen. But such privileges are strictly personal, granted only to those who are found through personal examination to measure up to the required standards. Public policy therefore requires that whatever correspondence purports to come from a lawyer in his official capacity must be at least passed upon and approved by him. He cannot delegate this duty of approval to one who has not been given the right to exercise the functions of a lawyer.

American Bar Association, Formal Opinion 68 (1932).

Equating proofs of claim with complaints disregards the distinction between the privileges that attain only to lawyers and the activities that are available to the lay public. The *Amici* urge the Court not to start down the slippery slope of whittling away at this distinction by equating proofs of claim with lawsuit pleadings.

III. THE COURT SHOULD NOT TREAT PROOFS OF CLAIM AS PLEADINGS AS A MATTER OF CONSTITUTIONAL AVOIDANCE

A. If Proofs of Claim Are Pleadings Then They Are Subject to the *Noerr-Pennington* Doctrine

The *Amici* contend that proofs of claim simply are not pleadings. However, if the Court treats proofs of claim as pleadings, such treatment invokes the protections of the First Amendment to the United States Constitution.

There are few rights more important than those protected by the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST amend. I. In the words of Judge Cudahy of the Seventh Circuit Court of Appeals:

> This right has deep common law roots and is the foundation of our republican (although not necessarily Republican) form of government. *See McDonald v. Smith*, 472 U.S. 479 (1985); *United States v. Cruikshank*, 92 U.S. 542, 552, 23 L. Ed. 588 (1875); *see also Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342 (7th Cir. 1977). Thus, parties may petition the government for official action favorable to their interests without fear of suit, even if the result of the petition, if granted, might harm the interests of others. *See United Mine Workers of America v. Pennington*, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-44, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961).

Tarpley v. Keistler, 188 F.3d 788, 794 (7th Cir. 1999).

If the Court equates the filing of a proof of claim with the filing of a lawsuit, then such filing is conduct that should be protected under the Petition Clause and the interpretation of that clause in *Noerr* and *Pennington*, *supra*. If proofs of claim are treated as pleadings, then the decision of the Eleventh Circuit unnecessarily burdens conduct that is protected by the First Amendment.

That the issue underlying the alleged FDCPA violation is the statute of limitations further underscores the importance of the protections afforded by the Petition Clause. As a result of borrowing statutes, ambiguous limitations statutes, and a lack of clear case law, the statute of limitations applicable to a given debt is uncertain – a conundrum recognized by courts across the country. *See, e.g., Panico v. Portfolio Recovery Assocs., LLC*, No. 15-1566-BRM-DEA, 2016 U.S. Dist. LEXIS 124729 (D.N.J. Sept. 14, 2016); *Gray v. Suttell & Assocs.*, 123 F. Supp. 3d 1283 (E.D. Wash. 2015); *Taylor v. First Resolution Inv. Corp.*, 2016-Ohio-3444, 2016 Ohio LEXIS 1654 (Ohio June 16, 2016); *Hill v. Am. Express*, 289 Ga. App. 576, 657 S.E.2d 547 (Ga. Ct. App. 2008); *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 927 N.E.2d 1059 (N.Y. 2010); *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 260 P.3d 915, 922-23 (Wash. App. Div. 2 2011); *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268 (M.D.Fla. 2008); *CACV of Colo., LLC v. Stevens*, 274 P.3d 859, 248 Ore. App. 624 (Or. Ct. App. 2012).[3] As is clear from

3. There are also a variety of tolling factors that make the bar date on a debt unclear. Temporary absence from a state, incarceration, mental disability, military service, and bankruptcy are all factors that could toll limitations, but the claimant in a suit or bankruptcy case has only the power to advocate for tolling, not to make a binding decision.

these cases, even experienced attorneys (on both sides of the docket) cannot always determine the correct statute of limitations. Attorneys must be able to advocate for the statute that best protects their clients, and such advocacy is protected by the First Amendment.

The *Amici* anticipate Respondent will argue that recognition of such Constitutional protection will undermine the protections afforded by the FDCPA, but any such argument wholly misses the point. As this Court knows, an act of Congress does not take precedence over the Constitution. *Marbury v. Madison*, 5 U.S. 137, 177-178 (1803). *See also, Citizens United v. FEC*, 558 U.S. 310 (2010) (recognizing that a statute cannot override the protections of the First Amendment). The Constitution is supreme, and "that which is not supreme must yield to that which is supreme." *Brown v. Maryland*, 12 Wheat. 419, 448 (1827). "]I]f the enforcement of any act of congress sacrifices the constitutional rights of the citizen, the act must yield to the higher law of the constitution." *Brown v. Walker*, 70 F. 46, 48 (C.C.D. Pa. 1895).

If the filing of a proof of claim is treated merely as a request for payment, then no petitioning conduct is at issue and no FDCPA violation has occurred, as the FDCPA does not prohibit a request for payment of a time-barred debt that is not accompanied by a suit or threat of suit. *See Freyermuth v. Credit Bureau Servs.*, 248 F.3d 767, 771 (8th Cir. 2001); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1332 (D.N.M. 2000); *Johnson v. Capital One*, No. SA-00-CA-315-EP, 2000 U.S. Dist. LEXIS 13311, 2000 WL 1279661, *1 (W.D. Tex. May 17, 2000). But if proofs of claim are equated with pleadings, the result is

not merely a chill on petitioning speech, but a hard freeze. Courts have repeatedly held that the FDCPA is a strict liability statute, imposing liability even for unintentional violations. *Russell v. Equifax ARS*, 74 F3d 30, 33 (2d Cir. 1996); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238-39 (5th Cir. 1997); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006); *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008). Furthermore, FDCPA defendants have been denied the defense of litigation immunity in FDCPA cases. *Sayyed v. Wolpoff & Abramson, LLP*, 485 F.3d 226, 229-30 (4th Cir. 2007). The First Amendment is the last refuge for debt collection attorneys and their clients who wish to advocate in good faith for a claim that could be, but is not necessarily time-barred. The *Amici* urge the Court to preserve this refuge by holding that the filing of a bankruptcy claim is neither a suit nor the equivalent of a suit, – but that if the Court equates the two processes, that it hold such conduct is protected by the First Amendment.

B. The Court Should Avoid Implicating Constitutional Concerns

As noted above, both FDCPA liability and the Petition Clause issues are implicated solely because the Eleventh Circuit has equated proofs of claim with the filing of a suit, since finding them not to be pleadings would result in a finding of no FDCPA liability under *Freyermuth* and *Huertas, supra.* Rejection of the Eleventh Circuit's analysis would enable this Court to avoid the Petition Clause issues raised above.

This Court has stated that "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 526 U.S. 227, 239 (1999) (*quoting United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). This principle "has for so long been applied by this Court that it is beyond debate," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The canon of constitutional avoidance is intended to show respect for Congress by presuming it "legislates in the light of constitutional limitations," *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

The *Amici* suggest that the simplest way to avoid implicating constitutional issues is to adopt the holdings in *Freyermuth* and *Huertas*, and hold that the filing of a proof of claim on a time-barred debt is neither a suit nor a threat of suit; therefore, such conduct does not violate the FDCPA. Such a holding is consistent with the facts, the existing case law, and the canon.

C. Application of the FDCPA to Proofs of Claim Is Unnecessary, as FED. R. BANKR. P. 3001 and 9011 Already Provide Adequate Remedies

As further reason for avoiding the clash between the FDCPA and the First Amendment that is created by the decision of the court below, the *Amici* assert that Congress and this Court have already provided adequate remedies for the conduct of which Johnson complains. The Bankruptcy Code provides a comprehensive scheme for the resolution of claims against a debtor's

estate. The Constitution grants Congress the power to establish uniform laws in just two areas: bankruptcy and naturalization. U.S. CONST. art. I, § 8, cl. 4. This Court has recognized the exclusive nature of the system for filing and resolving claims. In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004), the Court stated:

> Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate. (citation omitted). In a typical voluntary bankruptcy proceeding under Chapter 7, the debtor files a petition for bankruptcy in which she lists her debts or her creditors, (citation omitted); the petition constitutes an order for relief (citation omitted). The court clerk notifies the debtor's creditors of the order for relief, (citation omitted), and if a creditor wishes to participate in the debtor's assets, he files a proof of claim (citation omitted). . . .
>
> A bankruptcy court is able to provide the debtor a fresh start in this manner, despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the debtor and his estate, and not on the creditors. (citation omitted). A bankruptcy court's in rem jurisdiction permits it to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" (citations omitted).

Congress has legislated the process for filing and adjudicating claims through 11 U.S.C. § 501(a), which allows the filing of a proof of claim, and 11 U.S.C. § 502, which provides that claims are allowed unless objected to and sets forth the grounds for such objections. These statutory grants are implemented by rules governing the procedure for filing a claim, FED. R. BANKR. P. 3001; the consequences for failure to comply with those rules, FED. R. BANKR. P. 3001(c)(2)(D); filing a frivolous claim, FED. R. BANKR. P. 9011; and filing a false claim, 18 U.S.C. § 152(4).

FED. R. BANKR. P. 3001(c)(2)(D) provides specific consequences for filing a noncompliant proof of claim. Those consequences include rejection of the claim or an award of reasonable expenses and attorney's fees. FED. R. BANKR. P.9011 allows the imposition of sanctions not only for frivolous petitions, pleadings, and written motions, but also for "other paper[s]." Thus, this Court has already specified the remedy for the conduct of which Johnson complains.

The Bankruptcy Code, implemented by the Rules of Bankruptcy Procedure, is intended to be a comprehensive body of law addressing the conduct of bankruptcy proceedings. Attempting to apply an FDCPA overlay that invokes serious constitutional questions should be avoided for the reasons set forth above. Such an overlay is unnecessary in light of the protections afforded under Rules 3001 and 9011.

IV. THE COURT SHOULD RESOLVE THE PROBLEMS CREATED BY THE VARIOUS LOWER COURTS AND HOLD THAT SUIT ON A TIME-BARRED DEBT IS NOT A VIOLATION OF THE FDCPA

It has become commonplace for litigants in collection suits (and subsequent FDCPA proceedings) to disagree about the statute of limitations applicable to a debt. However, collection attorneys (like any other litigators) have both the privilege and the duty to petition courts on behalf of their clients, and if a reasonable argument can be made that a suit is not time-barred, the lawyer's ethical duties should compel him or her to prosecute the client's claims. The presence of a good-faith argument under the law is sufficient to shield the attorney from liability under rules such as FED. R. CIV. P. 11, its state law counterparts, and FED. R. BANKR. P. 9011. On the other hand, those rules, and the well-established "sham" exception to the *Noerr-Pennington* Doctrine protect debtors from unscrupulous attorneys who file suits that they know are time-barred, hoping that the debtor will default.

The constitutional infirmity that is of concern to the *Amici* arises solely because courts have added to the FDCPA provisions not included by Congress. Although the drafters of the FDCPA crafted detailed lists of violative conduct, including specific provisions regarding venue in suits brought by debt collectors, they did not include suits on time-barred debts. The alleged prohibition on such suits is a creation of the lower courts that amounts to legislation by judicial decree. Such expansion of the FDCPA was improper.

Attorneys play a crucial role in advancing their clients' requests to courts. *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 545 (2001) (law restricting arguments available to attorneys "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"), cited in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 623 (2010) (Kennedy, J., dissenting). That petitioning conduct includes requests to courts and communications incidental to a court action. If a lawyer incurs liability under the FDCPA because the suit that (s)he thought was timely is ultimately determined to be time-barred, then creditors' attorneys cannot carry out their ethical duties of competence, diligence, and advocacy when clients need them to advance, clarify, or, extend the law of limitations or make a good-faith argument to reverse existing law. The FDCPA's *bona fide* error defense imposes too many burdens[4] to be an adequate response to the restrictions on advocacy and petitioning created by the line of FDCPA cases dealing with suits on time-barred debts.

This Court has warned that the FDCPA should not be assumed to compel absurd results when applied to debt collection attorneys. *Jerman*, 559 U.S. at 600, 130 S.Ct. 1605, 1622, 176 L.Ed.2d 519, 539. Those lower courts which have held that a suit on a time barred debt violates the FDCPA have disregarded that warning. The consequence is an additional problem that this Court has warned against – lawyers face liability under a strict

4. A review of the PACER docket in *Gray v. Suttell*, *supra*, provides insight into the amount of work that can be necessary to present a *bona fide* error defense. The cost of such defense so thoroughly dwarfs the exposure in an individual FDCPA case (and many a class case) so as to render the defense meaningless.

liability statute for an unsuccessful suit, even when the suit advances limitations arguments that were not previously resolved. *See Heintz v. Jenkins*, 514 U.S. 291, 296, 115 S. Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995); *Jerman*, 130 S.Ct. at 1622. Respectfully, making attorneys the strictly liable insurers of their clients' success falls within the realm of 'absurd" results. Therefore, on behalf of their respective members the *Amici* urge the Court to reject completely the doctrine that the FDCPA forbids suits on time-barred debts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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Walter W. Heiser, *Can the Tolling of Statutes of Limitations Based on the Defendant's Absence from the State Ever Be Consistent with the Commerce Clause?*, 76 Mo. L. Rev. 385 (2010) 14

Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* (4th ed. sec. rev. June 7, 2004) 16, 17

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees (NACTT) is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process, including debtors' attorneys, creditors' representatives, and chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the chapter 13 standing trustees in the United States are voting members of the NACTT. Mary Ida Townson, a Chapter 13 Standing Trustee for the Northern District of Georgia and current president of the NACTT, and the NACTT's Board of Directors, have directly authorized Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of Tennessee, to prepare and submit this brief on the NACTT's behalf.

Historically, Congress and federal courts have observed that the more efficient and effective chapter 13

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[1] In accordance with Supreme Court Rule 37.2(a), the NACTT states that both the petitioner and the respondent have filed letters with the Court granting blanket consent to the filing of *amicus curiae* briefs. In accordance with Supreme Court Rule 37.6, the NACTT states that no counsel for a party authored this brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief.

programs are those conducted by chapter 13 standing trustees who exercise a broad range of responsibilities in both the design and effectuation of chapter 13 plans. *See Tower Loan of Miss., Inc. v. Maddox (In re Maddox)*, 15 F.3d 1347, 1355 (5th Cir. 1994). A chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every chapter 13 plan. *See* 11 U.S.C. § 1302. A chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to creditors. The trustee is empowered to assert claims, avoid preferences and fraudulent transfers, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to holders of allowed claims. *Maddox*, 15 F.3d at 1355; *Boyle v. Wells (In re Gustav Schaeter Company)*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the collective interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of funds to creditors pursuant to a confirmed plan occurs according to the dictates of Congress, as set forth in title 11 of the United States Code (the Bankruptcy Code). *Maddox*, 15 F.3d at 1355.

The NACTT thus has expertise in the bankruptcy law involved in this case. The NACTT's voice is particularly important because Midland's argument relies, in part, on contentions about trustees' duties to object to the allowance of time-barred claims. Midland's theory encourages a practice that significantly

burdens other parties – including chapter 13 trustees – but provides no legitimate benefits.

SUMMARY OF THE ARGUMENT

The Bankruptcy Code does not preclude the application of the Fair Debt Collection Practices Act (FDCPA) to the claims-allowance process in bankruptcy cases. The two statutes easily coexist in this context, with the protections of the FDCPA (applicable to a certain class of creditors and their agents) complementing the general protections under the bankruptcy laws (applicable to all parties). Midland's broader suggestion that consumer protection laws fall away once an individual comes under the protection of the bankruptcy court has troubling implications. Consumer protection laws are often entirely consistent with the bankruptcy laws. Conduct that would otherwise violate these laws should not receive a pass just because it occurs during a bankruptcy case.

Midland asserts that a creditor has a "right" to file a proof of claim even when the creditor agrees that the applicable statute of limitations bars the claim. This practice is just an effort to catch the system in a mistake. Stale claims clearly do slip through; if they never did, creditors like Midland would not bother with the effort. But the truism that human actors will make mistakes is not a complete explanation. Systemic factors are likely at play as well. The multiple parties with authority to object to claims do not provide the

redundant layers of defense that Midland depicts. In fact, the parties' interests rarely align, and the delineation of responsibilities is not always clear. The parties face collective-action and coordination problems, and Midland's practice exploits these problems.

The Bankruptcy Code permits a creditor to file a proof of claim; it does not require it. Because Midland's practice, at best, draws trustees and other parties into a wasteful exercise, the Court should not condone it.

ARGUMENT

I. The bankruptcy system does not preclude enforcement of the FDCPA or other consumer protection statutes in bankruptcy cases.

Midland argues that the FDCPA's regulations of debt collection practices are inconsistent with a creditor's "right" to file a proof of claim and the bankruptcy system's "comprehensive" scheme for governing the relations of creditors and debtors. This argument is wrong in this case and pernicious in its broader implications.

A. The Bankruptcy Code does not preclude FDCPA liability based on the filing of an abusive proof of claim.

Interpreting the FDCPA to prohibit a debt collector from requesting payment in a bankruptcy case on

a concededly stale claim would not conflict with the Bankruptcy Code. The Code does not require a creditor to file a proof of claim, so a debt collector can plainly comply with both statutes by simply electing not to file a proof of claim when doing so would violate the FDCPA.

Midland argues that FDCPA liability would conflict with the "right" to file a proof of claim under § 501(a) of the Bankruptcy Code. *See* 11 U.S.C. § 501(a) ("A creditor . . . may file a proof of claim."). This provision, however, just gives a creditor the power to file a proof of claim, not an absolute right to do so. The significance of the provision is that the creditor has the option not to file a proof of claim. It pairs with subsections (b) and (c), which give other parties, including the debtor and the trustee, the authority to file a proof of claim if the creditor does not. *See* 11 U.S.C. § 501(b), (c).

The permissiveness of § 501(a) thus does not suggest that creditors have license to file proofs of claim when doing so would be improper. Almost the opposite – because the creditor is free under the Code not to file a proof of claim, the creditor bears the responsibility for an abusive filing. Section 501(a) does not insulate a creditor from allegations that its filing of a proof of claim is abusive any more than Rule 7 of the Rules of Civil Procedure (listing pleadings that are "allowed") precludes sanctions under Rule 11 for an allowed but abusive pleading.

If the "right" to file a proof of claim were as broad as Midland contends, it might even undermine the

bankruptcy scheme to combat abuse that Midland argues governs. The right Midland asserts is a statutory right, so if it were absolute, Bankruptcy Rule 9011 would have to yield. *See* 28 U.S.C. § 2075 (providing that rules of practice and procedure "shall not abridge, enlarge, or modify any substantive right").[2] And, similarly, courts would have no ability to impose sanctions for the filing of a proof of claim under § 105 or in exercise of their inherent powers. *See Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) ("[I]n exercising [its] statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions.").

The bankruptcy system's abuse-prevention scheme is not inconsistent with the FDCPA or additional regulations. In fact, the linchpin of the bankruptcy scheme, Bankruptcy Rule 9011, might itself prohibit Midland's practice. *See, e.g.*, *In re Sekema*, 523 B.R. 651, 654-55 (Bankr. N.D. Ind. 2015). Civil Rule 11 is nearly identical, *compare* Fed. R. Civ. P. 11 *with* Fed. R. Bankr. P. 9011, and courts have concluded that, "[w]here an

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[2] An absolute "right" to file a proof of claim might also suggest a conflict with the discharge injunction when a debtor files a new case. Like many statutes of limitation, the discharge injunction does not fully eliminate a debt. It "extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam*." *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991); *see also Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, 53 (5th Cir. 1993) ("A discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt."). Yet, in most circumstances, the discharge injunction "prohibits filing a proof of claim for a discharged debt." *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1321-23 (11th Cir. 2015).

attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, . . . he makes a claim groundless in law and is subject to Rule 11 sanctions." *Brubaker v. City of Richmond*, 943 F.2d 1363, 1385 (4th Cir. 1991) (footnote omitted); *see also White v. General Motors Corp.*, 908 F.2d 675, 682 (10th Cir. 1990) ("[A]n otherwise time-barred [lawsuit] may be filed, with no mention of the statute of limitations if the attorney has a nonfrivolous argument that the limitation was tolled for part of the period."); *FDIC v. Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994) (citing *White* with approval).

The abuse-prevention powers available to bankruptcy courts, which Midland describes as "comprehensive" and incompatible with additional regulations, are in truth very similar to the powers held by most courts. As noted, Bankruptcy Rule 9011 has a nearly identical counterpart in the Federal Rules of Civil Procedure, *see supra*, and in many state-court rules, *see Restatement (Third) of the Law Governing Lawyers* § 110 reporter's note (1997) (listing states with rules similar or identical to Rule 11). Similarly, the inherent power of bankruptcy courts to sanction abuse is a power shared by all federal courts. The one abuse-prevention power that is unique to the bankruptcy system is § 105 of the Code, but that provision just provides general authority to address abuses, nothing that is inconsistent with the enforcement of other abuse-prevention laws.

Midland's argument that the general abuse-prevention powers of the bankruptcy courts preclude

the enforcement of consumer protection measures would be a back-door attack on the broad consensus that filing a lawsuit on a stale debt violates the FDCPA. *See, e.g.*, *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). After all, Rule 11 and similar state rules of civil procedure govern court pleadings. By Midland's thinking, defendants are under the protection of the court system once a complaint is filed and no longer need the protections of the FDCPA. But conduct that would otherwise violate a consumer protection law should not receive a pass just because it occurs during a court case.

That the Code makes the expiration of the statute of limitations a basis for the disallowance of a claim is, similarly, no indication that Congress invited or encouraged a debt collector to assert a claim it knows to be unenforceable. Even if the Code directly prohibited the assertion of a time-barred claim, it would still need a mechanism for disallowing a claim asserted in violation of the proscription. The existence of this mechanism is just evidence that Congress intended parties in interest to have the power to contest distributions on time-barred claims. It says nothing about the propriety of a creditor asserting a claim it agrees is subject to a complete defense.

Interpreting the FDCPA to prohibit debt collectors from asserting stale claims also would not, by itself, imply any conflict with the claims-allowance process. Not all creditors qualify as "debt collectors" under the FDCPA, so the power to disallow a stale claim in

bankruptcy would be relevant even if the FDCPA entirely prevented debt collectors from asserting such claims.

B. The FDCPA and other consumer protection laws do not become irrelevant once an individual files bankruptcy.

Midland suggests that protections under the bankruptcy laws and protections under the FDCPA operate in entirely different spheres, that once an individual comes under the protection of the bankruptcy system, the consumer protections laws like the FDCPA fall away. This theory is not limited to direct statutory conflicts. It is based on the mistaken idea that bankruptcy provides a "comprehensive" system for addressing debtor-creditor relations and that enforcing any general consumer financial protection law in bankruptcy would upset the delicate balance. This approach would remove the protections of remedial statutes even when the statutes are compatible with bankruptcy protections.

The argument draws on a misreading of this Court's statements in *Kokoszka v. Belford*. In that case, the Court examined whether a trustee in bankruptcy was entitled to seize a tax refund derived from the debtor's prepetition tax withholding despite a general federal limitation on the garnishment of "disposable earnings." In assessing the conflict between the bankruptcy law (at that time, the Bankruptcy Act) and the later garnishment statute, the Court noted that

Congress's concern in enacting the garnishment statute "was not the administration of a bankrupt's estate but the prevention of bankruptcy in the first place." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Midland argues that *Kokoszka* implies that the FDCPA does not apply within a bankruptcy case because, like the garnishment law in *Kokoszka*, one of its goals was the prevention of bankruptcy. But the Court's holding in *Kokoszka* implies just the opposite.

The lesson from the decision is one that the Court has emphasized repeatedly – that "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). In *Kokoszka*, the Bankruptcy Act was the prior-enacted statute; the Court referred to the nonbankruptcy purpose of the garnishment law in support of its effort to give as much effect as possible to the prior-enacted bankruptcy law. In this case, the FDCPA is the prior-enacted law, so *Kokoszka* supports giving effect to it to the extent possible. That is easily accomplished here. The two statutes present no direct conflict. The FDCPA's abuse-prevention provisions (governing "debt collectors") complement those under the bankruptcy laws (applicable to all parties).

Midland's misreading of *Kokoszka* – its suggestion that consumer protection laws yield to bankruptcy protections – also has troubling broader implications. Consumer protection statutes remain relevant after an

individual has filed a bankruptcy petition. For example, mortgage servicing regulations provide borrowers important tools for resolving questions and disputes. *See, e.g.*, 12 C.F.R. §§ 1024.35, 1024.36. Once a borrower files a bankruptcy petition, the borrower has general powers under the bankruptcy laws for gathering information and resolving disputes, but these powers are not inconsistent with the regulations tailored to mortgage servicing. A debtor, for example, has discovery tools under the bankruptcy rules. *See* Fed. R. Bankr. P. 2004(c) (providing the power to compel the "attendance of any entity for examination and for the production of documents"); Fed. R. Bankr. P. 9014(c) (making many discovery rules applicable in contested matters such as claim objections). The nonbankruptcy laws and regulations, however, remain valuable after a debtor has filed bankruptcy – in some instances, even to bankruptcy trustees. *See, e.g.*, *Miller v. Ameriquest Mortg. Co. (In re Laskowski)*, 384 B.R. 518, 531-32 (Bankr. N.D. Ind. 2008) (holding that a trustee had standing to assert claims under the Real Estate Settlement Procedures Act (RESPA)). Any suggestion by this Court that the bankruptcy system provides a "comprehensive" scheme that is incompatible with other consumer protection or abuse-prevention measures might limit a wide range of rights regularly asserted in bankruptcy cases. *See, e.g.*, *id.* at 528 n.10 ("Courts regularly review debtors' allegations of RESPA violations within the bankruptcy remedial system."). This result would be detrimental, and it is unwarranted by the text of the statutes.

II. The Court should not condone the practice of filing proofs of claim for concededly time-barred debts.

Midland and debt collectors like it regularly file proofs of claim for stale debt. And they seem to have adopted the "sharp practice" of doing so even when they agree that the applicable statute of limitations bars enforcement of the debt. *Dubois v. Atlas Acquisitions, LLC (In re Dubois)*, 834 F.3d 522, 533 (4th Cir. 2016) (Diaz, J., dissenting). Midland's defense is essentially that creditors have a right to see whether their claims will slip through the cracks, as long as they do not affirmatively misrepresent the status of the debt. The Court should not condone this practice.

Part of Midland's argument is that trustees have a duty to object to improper claims if a purpose would be served. This solution is imperfect and wasteful, and its costs ultimately fall to debtors and other creditors. To what end? The only purpose of the exercise is to give Midland and debt buyers like it the opportunity to catch the system in a mistake.

A. The practice exploits weaknesses in the claims-review process.

When a creditor agrees that its claim is unenforceable, the filing of a proof of claim is not a legitimate collection activity. Its only purpose is to exploit weaknesses in the claims-review process. Courts have consistently found that filing a lawsuit on a stale debt violates the FDCPA. *See Crawford v. LVNV Funding,*

LLC, 758 F.3d 1254, 1259 (11th Cir. 2014) (collecting cases). Midland argues that filing a proof of claim in bankruptcy is different because the checks on creditors are greater in bankruptcy cases. Midland, in other words, makes little effort to defend the result a creditor asserting a concededly stale claim seeks: the allowance of an unenforceable claim. Midland's principal argument is that the practice is not abusive because someone is supposed to stop it from succeeding. But the protections against the allowance of stale claims are not perfect.

Contrary to Midland's suggestion, not all proofs of claim present the information necessary for even a basic evaluation of the effect of statutes of limitations. Midland highlights the requirements under Rule 3001(c)(3), but those requirements apply only to proofs of claims based on open-end or revolving consumer credit agreements (other than those secured by the debtor's real property). Fed. R. Bankr. P. 3001(c)(3). Many debts do not fall into this category.

Rule 3001(c)(3), when it applies, requires a creditor to provide information that is often sufficient to identify a defense based on a statute of limitations, information like the date of an account holder's last transaction, the date of the last payment on the account, and the date on which the account was charged to profit and loss. But that means, for those claims, that the debt collector has – or should have – the information it needs to assess the enforceability of its claim itself. That there are bankruptcy remedies, such as claim disallowance, is not dispositive as to whether a

debtor might have an action under a nonbankruptcy law like the FDCPA in addition to the bankruptcy remedies available to the debtor and to other parties, including the trustee. The rule suggests that the Rules Committee thought time-barred claims were slipping past the claims review process due to inadequate information, but its facilitation of the disallowance of these claims is hardly an indication that the Committee believed claimants should be asserting the claims in the first place.

Even when Rule 3001(c)(3) applies, the information a creditor must provide is not always enough to assess the effect of the statute of limitations. Information to establish tolling of the statute of limitations, for example, might not be apparent from the Rule 3001(c)(3) disclosures. *See, e.g.*, 50 U.S.C. § 3936(a) (providing for tolling of statutes of limitations during military service); Walter W. Heiser, *Can the Tolling of Statutes of Limitations Based on the Defendant's Absence from the State Ever Be Consistent with the Commerce Clause?*, 76 Mo. L. Rev. 385, 385 (2010) ("Most states have legislation that tolls applicable statutes of limitations during the time a defendant is absent from the state."). The same is true of actions that might have revived a statute of limitations. *See, e.g.*, *In re Vaughn*, 536 B.R. 670, 677 (Bankr. D.S.C. 2015) (noting that, under South Carolina law, a borrower may revive a time-barred claim not only by "partial payment of the debt" but also by "some writing signed by the party to be charged thereby.") (quoting S.C. Code Ann. § 15-3-120) (internal quotation marks omitted). Difficult

questions about conflicts of law also inject some uncertainty into the determination of the applicable statute of limitations. *See, e.g.*, *Sterba v. PNC Bank (In re Sterba)*, 516 B.R. 579, 584-86 (B.A.P. 9th Cir. 2014). Without a copy of the agreement between the debtor and the lender – documentation that a creditor on an open-end or revolving debt is not required to provide with the proof of claim, *see* Fed. R. Bankr. P. 3001(c)(3)(B) – trustees and other creditors might lack information required to assess this issue. Because of the asymmetry of information, trustees and other creditors should be able to assume that a creditor requesting distributions from the estate has a good-faith belief that its claim is enforceable, especially when the party filing the proof of claim is a debt collector that is knowledgeable about statutes of limitation.

Filing a concededly time-barred claim takes advantage of the system in other respects as well. The claims-allowance process is, of course, only as good as the human actors involved, and some time-barred claims are no doubt missed as a result of inadvertence. But systemic issues likely contribute to the problem. Midland depicts the multiple parties with authority to object to proofs of claim as redundant layers of protection against the allowance of unenforceable claims. But the other parties' duties and interests rarely align; in fact, trustees and creditors have the most cause to object to stale claims when the debtors' incentives are weakest, and vice versa. The roles of the different parties also can be uncertain, creating the risk that each party will assume that another is responsible.

Chapter 13 trustees do not have the duty to object to time-barred claims in every instance. Trustees have fiduciary duties to the estate, not to any individual party; they are responsible to the creditors collectively. *See Tower Loan of Miss., Inc. v. Maddox (In re Maddox)*, 15 F.3d 1347, 1355 (5th Cir. 1994) ("[T]he chapter 13 trustee serves the interests of *all* creditors. . . .") (emphasis added). And though chapter 13 trustees owe some limited duties directly to debtors, *see, e.g.*, 11 U.S.C. § 1302(b)(4), the trustees are not generally responsible for protecting debtors' individual interests. In fact, trustees are often pitted against debtors in chapter 13 matters.

If a debtor's plan guarantees full payment of unsecured claims, the debtor is the only party affected in any significant way by the allowance of a particular claim. In that situation, the trustee does not have the clear duty to object to a stale claim because no purpose under the trustee's purview would be served. *See* 11 U.S.C. § 704(a)(5) (limiting the trustee's duty to instances in which a "purpose would be served"). But the effect is not limited to full-repayment plans. The same can be true in any plan that guarantees a specific dividend to unsecured claims (as opposed to just a pool of money to be distributed pro rata). And the "predominant form of chapter 13 plan" is a plan that guarantees *both* a minimum pool of money and a minimum percentage dividend to unsecured creditors. Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* (4th ed. sec. rev. June 7, 2004) § 170.1, at ¶ [9],

www.Ch13online.com. Under such plans, the allowance of a stale claim might principally affect the debtor, even when the dividend is less than 100%.[3]

The trustee's duty is nuanced when the applicable statute of limitations provides only an affirmative defense, without extinguishing debts. The claimant may have a "claim" in that situation, *see* 11 U.S.C. § 101(5), making it a "creditor" under § 101(10) of the Bankruptcy Code. *But see Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990) ("The plain meaning of a 'right to payment' is nothing more nor less than an *enforceable* obligation. . . .") (emphasis added). If so, the claimant would be one of the creditors to whom the trustee owes a collective duty. Though a trustee would almost certainly be within his or her rights in objecting to a stale claim, the trustee might have more discretion than Midland suggests.

Trustees also must make practical assessments of the purpose to be served in objecting to a claim. For small claims, the cost of an objection can easily outweigh the harm to the estate that the objection would

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[3] One advantage of the plan form is that it permits confirmation of the plan before the claims bar date. *See* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* (4th ed. sec. rev. June 7, 2004) § 170.1, at ¶ [10]. But this advantage also means that the dividend can control even when it is less than 100%. For example, a plan might guarantee a minimum dividend of 50% and a minimum pool of $5,000 to unsecured claims. If the allowed unsecured claims end up exceeding $10,000, then the dividend would be the determinative number. In that situation, the allowance of a stale claim would increase the amount a debtor would have to pay to complete the plan.

present in the particular case. This effect does not diminish the aggregate harm of these claims, but it creates a friction in the system for preventing it.

B. The practice imposes an unnecessary cost on the system.

Midland's insistence on its right to make other parties object to its claims ignores the question of cost. Trustees and debtors' attorneys may have duties to object to time-barred claims, perhaps motivated by different reasons, but forcing them to perform those duties when the result is a foregone conclusion is not harmless.

Performing the task draws resources from trustees' and attorneys' other duties in the case (and, depending on the debtor's attorney's fee structure, may even have an immediate monetary effect). Even if the effort does not generate a fee specific to the task, the additional work obviously factors into the fees trustees and debtors' attorneys receive. Chapter 13 trustees fund their operations from a percentage commission on payments under the plan. *See* 28 U.S.C. § 586(e)(1)(B). The reasonable expenses of the operation dictate the percentage (up to a cap), so the cost of the exercise Midland and other debt collectors demand affects the fee required to operate trustees' offices. That fee is ultimately borne by the debtors who must pay a higher commission to the trustee and creditors who may receive smaller distributions as a result.

C. The practice can harm debtors.

Midland suggests that the allowance of stale claims does not harm debtors except in the relatively rare cases involving full repayment of unsecured claims. This suggestion understates the potential harm to debtors.

As already noted, the amount a debtor must pay to complete a chapter 13 plan can depend on the allowed claims in *any* plan that guarantees a specific dividend, if the dividend proves to be the controlling number. *See supra* note 3 and accompanying text.

Midland's argument also ignores the reality that many chapter 13 plans do not end in a discharge and that the discharge does not address all claims. In some cases, the discharge is unavailable even if the case completes. *See* 11 U.S.C. § 1328(f). But many chapter 13 cases do not complete at all, even cases that achieve plan confirmation. *See, e.g.*, Ed Flynn, *Chapter 13 Case Outcomes by State*, Am. Bankr. Inst. J., Aug. 2014, at 40 ("If a debtor has a chapter 13 case confirmed, there is a slightly-better-than-even chance that the repayment plan will be completed."). And even when a debtor obtains a discharge, it may not cover all of the individual's debts. *See, e.g.*, 11 U.S.C. § 523(a) (stating exceptions to discharge); 11 U.S.C. § 1328(a)(1)-(4) stating exceptions to the general chapter 13 discharge); 11 U.S.C. § 1328(c) (stating exceptions to the chapter 13 "hardship" discharge). Distributions on stale debts harm debtors directly when they reduce

distributions on claims that remain enforceable after the case ends.

Debtors might even face the misguided argument that the inclusion of a debt in their bankruptcy schedules or disbursements on the debt under a confirmed plan revived the statute of limitations. *See, e.g.*, *In re Vaughn*, 536 B.R. 670, 680 (Bankr. D.S.C. 2015) (rejecting this argument); *Hope v. Quantum3 Group, LLC (In re Seltzer)*, 529 B.R. 385, 395 (Bankr. M.D. Ga. 2015) (same).

Midland argues that its practice benefits debtors by helping to ensure the discharge of time-barred debts when the debtor has failed to schedule them. That argument is entertainingly cynical. The purpose of filing a proof of claim is to request distributions on the claim. Even if the practice occasionally – and, presumably, accidentally – facilitates the discharge of some debts, the effect is almost certainly substantially outweighed by the much more plausible harms to debtors.

D. The potential chilling effect of applying the FDCPA to the claims-allowance process is not a basis for denying enforcement of the law.

Though Midland offers no indication that it believed its claim in this case was enforceable when it filed the proof of claim, it argues that holding it liable might cause creditors that do believe their claims are enforceable to opt out of the claims-allowance process for fear of potential FDCPA liability. These concerns

should not prevent the Court from holding the FDCPA applicable.

The Court responded to similar concerns when it held that the FDCPA applied to attorneys acting as debt collectors by noting that the Act offers protection from liability if the collector "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995) (quoting 15 U.S.C. § 1692k(c)) (internal quotation marks omitted). Even if this defense is not ironclad – courts are divided on its application to errors of state law, *see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 580 n.4 (2010) – the potential chilling effect should not prevent the Court from affirming liability.

The Court recently provided a thorough response to similar concerns in concluding that the defense under § 1692k(c) does not apply to errors in the interpretation of the FDCPA itself. *Id.* at 596-605. The Court noted various reasons to discount the concerns about chilling effects from FDCPA liability but, perhaps more importantly, also concluded that any "arguments that the Act strikes an undesirable balance in assigning the risks of legal misinterpretation are properly addressed to Congress." *Id.* at 604. The same is true here. If the FDCPA's provisions have an excessively chilling effect on the filing of proofs of claim, the body to address the problem is Congress.

The practice of filing proofs of claim for concededly time-barred debts serves no valid collection purpose. If the system works as Midland agrees it should, then another party will be forced to expend resources to assert the defense to the claim that the creditor agrees applies. The practice benefits Midland and debt collectors like it only when the system fails. Trying to slip a claim past the claims-review process is just an effort to exploit weaknesses in the system.

CONCLUSION

For the foregoing reasons, the NACTT requests that the Court affirm the decision of the Court of Appeals that the Bankruptcy Code does not preclude an FDCPA claim in the context of a chapter 13 bankruptcy when a debt collector files a proof of claim that it knows to be time-barred.

Respectfully submitted,

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RECORD AND BRIEFS

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Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy case violates the Fair Debt Collection Practices Act.

2. Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.

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CASES

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Heintz v. *Jenkins*,
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Lewis v. *Manufacturers National Bank*,
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Marx v. *General Revenue Corp.*,
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Midlantic National Bank v. *New Jersey Department of Environmental Protection*,
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Miles v. *Apex Marine Corp.*,
498 U.S. 19 (1990) 34, 35

In re Moore,
247 B.R. 677 (Bankr. W.D. Mich. 2000) 20

Morton v. *Mancari*,
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Nobelman v. *American Savings Bank*,
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Patterson v. *Shumate*,
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In re Schwartz-Tallard,
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Bankruptcy Code, 11 U.S.C. §§ 101–1532:

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§ 327(a) 5

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Rule 3001(f) 3
Rule 3002(c) 3
Rule 3007(a) 4
Rule 9014(c)-(e) 4
Rule 9022(a) 4

OTHER AUTHORITIES

American Bankruptcy Institute, *Annual Business and Non-business Filings by Year (1980-2015)*, http://tinyurl.com/filingdata 7
American InfoSource, *AIS Insight 2015 Year in Review*, http://tinyurl.com/2015AISreview 9

Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815 (1987) 32

Collier on Bankruptcy (16th ed. 2016):

Vol. 4 ..... 3, 4

Vol. 9 ..... 4, 21

Federal Reserve Board, *G.19 Statistical Release* (Dec. 7, 2016), http://tinyurl.com/FRBdebtdata 16

Federal Trade Commission, *The Structures and Practices of the Debt Buying Industry* (January 2013), http://tinyurl.com/2013FTCreport 8, 9

Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard 1986) 32

Kenneth N. Klee & Whitman L. Holt, *Bankruptcy and the Supreme Court: 1801-2014* (West Academic 2015) 32

LexisNexis, *Banko® Solutions* (last visited Dec. 20, 2016), http://tinyurl.com/bankoLN 19

Official Form B 410 24

Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103 (2011) 15

S. Rep. No. 95-382 (1977) 22, 28

United States Bankruptcy Court for the Central District of California, *Annual Report 2015*, http://tinyurl.com/CACBreport 7

Webster's Second New World Dictionary (1972) 23, 26

INTEREST OF *AMICI CURIAE*[1]

The National Association of Consumer Bankruptcy Attorneys (NACBA) is the leading nonprofit organization serving consumer bankruptcy attorneys and advocating for consumer debtors' rights. NACBA is nationally recognized for, among other things, filing *amicus curiae* briefs in this Court and the federal courts of appeals in systemically-important consumer bankruptcy cases. Many notable decisions explicitly rely on NACBA's briefs. *E.g.*, *In re Schwartz-Tallard*, 803 F.3d 1095, 1100 (9th Cir. 2015) (en banc).

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

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[1] No counsel for a party authored this brief in whole or in part. No person other than undersigned counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties' blanket consents to the filing of *amicus curiae* briefs are noted on the docket.

This case presents questions of systemic importance raised by a business model professional debt collectors use to collect time-barred debts in consumer bankruptcy cases. Pursuit of time-barred debts imposes costs on debtors, other creditors, professionals, and institutions operating in the consumer bankruptcy system. Lawsuits to collect these stale debts in court would violate the Fair Debt Collection Practices Act (FDCPA), and it makes no sense to allow debt collectors to evade this federal prohibition on litigating stale claims to collect the same debts through the federal bankruptcy courts.

The contrary position urged by petitioner and its *amici* ignores the realities of bankruptcy practice in consumer cases and disregards this Court's bankruptcy jurisprudence. NACBA and NCBRC therefore respectfully submit this *amici curiae* brief to focus the Court on key bankruptcy realities and principles germane to the resolution of this case.

STATEMENT

A. Overview of the Bankruptcy Claims Process

Claim administration in bankruptcy permits creditors with legitimate claims against an insolvent debtor to efficiently assert those claims and collect ratable payment consistent with their substantive entitlements under nonbankruptcy law except where Congress specifically alters that law to confer a priority on, disallow, or subordinate specific claims. See, *e.g.*, *Travelers Cas. & Sur. Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 449-451 (2007). This

framework exists because bankruptcy is a specialized procedure operating against a background of generally applicable law to channel claims against the debtor into a collective forum and then distribute a common *res*. See *Tenn. Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 447-448 (2004).

The process begins with the filing of a proof of claim, which may be filed by a creditor or by other parties if the creditor does not timely do so. See 11 U.S.C. §501; 4 *Collier on Bankruptcy* ¶501.01[1], p. 501-4 (16th ed. 2016) ("[T]he filing of a proof of claim or interest is permissive, and no creditor or interest holder is ever required to file one."). A creditor choosing to participate must complete and execute a proof of claim conforming to the appropriate official form (currently Official Form B 410) within the deadline prescribed by the rules. See Fed. R. Bankr. Proc. 3001(a)-(b) & 3002(c). Proofs of claim based on most consumer credit agreements must include certain information, see *id.* 3001(c)(3)(A), but there is no requirement that such a proof of claim attach the underlying agreement or provide information sufficient to ascertain the governing state law (a copy of the agreement, which will ordinarily have an enforceable choice-of-law provision, must instead be provided on written request, see *id.* 3001(c)(3)(B)).

Every filed proof of claim "is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. §502(a). See also Fed. R. Bankr. Proc. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim."). The burden then falls on the bankruptcy trustee, the debtor, or

another party in the bankruptcy case to show that the proof of claim should be disallowed on one of the bases in Bankruptcy Code §502(b), including because of the statute of limitations. See 11 U.S.C. §502(b)(1) (claim shall be disallowed when "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured"); 4 *Collier on Bankruptcy* ¶502.03[2][b], p. 502-21 (under §502(b)(1), a claim is subject to disallowance based on any defenses "the debtor could have interposed, absent bankruptcy, in a suit on the claim by the creditor" under applicable state or other nonbankruptcy law, such as "usury, fraud, lack of consideration, unconscionability or the expiration of a statute of limitations").

In contrast to the simplified process for filing proofs of claim, the claim objection process is not frictionless. Objectors must prepare a written claim objection, notice a hearing, and then serve those documents on multiple parties. Fed. R. Bankr. Proc. 3007(a). Filing an objection creates a "contested matter" governed by applicable rules of court. *Id.* 9014(c)-(e). The objector bears the burden of offering facts and legal theories sufficient to overcome the *prima facie* validity of the proof of claim. See 9 *Collier on Bankruptcy* ¶3007.01[3], p. 3007-7. The objecting party or its counsel must be prepared to attend a hearing before the bankruptcy court regarding the objection, and either the objector or the court must prepare and process an order formally disallowing the claim. See Fed. R. Bankr. Proc. 9022(a). Even the simplest claim objection requires

several hours of party, professional, and court time. Accordingly, any potential claim objection must be subjected to a cost-benefit analysis; objections that will cost more to process than the anticipated distribution on the objectionable claim will rationally be forgone.[2]

If the cost of objection exceeds the savings from disallowance, bankruptcy trustees properly will refrain from objecting. See 11 U.S.C. §704(a)(5) (trustee should object only "if a purpose would be served"). If a trustee does prosecute a claim objection, the trustee's counsel is paid as an administrative expense with a priority right against the property of the debtor included within the bankruptcy estate. See 11 U.S.C. §§327(a), 330(a), 503(b)(2) & 507(a)(2). In a Chapter 7 case, these expenses are entitled to payment before almost every unsecured creditor. See 11 U.S.C. §726(a)(1)-(2). In a Chapter 13 case, the debtor's plan must pay these expenses in full. See 11 U.S.C. §1322(a)(2). Claim

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[2] For example, assume that (i) Creditor X files a proof of claim based on a stale debt of $500, (ii) Creditor X paid $4 to buy the debt and spends another $1 preparing and filing the proof of claim, and (iii) the bankruptcy estate's assets will fund a 10% distribution to unsecured creditors. If it costs more than $50 to object, no one will object, the claim will be deemed allowed, and Creditor X will receive a distribution of $50 on an unenforceable debt for a 900% profit ($45) at others' expense. Standing up to the bully knowingly asserting a legally barred claim in bankruptcy is uneconomic in many if not most consumer cases, even if everyone knows the bully will not fight when an objection is made. This is the lucrative and exploitive business model at issue here. See Statement Part C, *infra*.

objections decrease other unsecured creditors' distributions or decrease the prospects of the debtor confirming and completing payments under a Chapter 13 plan to the extent that any incremental administrative costs exceed the savings from disallowance. Even when an objection is economically rational, the administrative cost of objecting to meritless claims is a deadweight loss that reduces legitimate creditors' recoveries from what they would have been if the knowing filing of stale claims were not permitted in the first place.

All allowed bankruptcy claims ultimately receive cash distributions in accordance with the Bankruptcy Code's priority scheme. In a Chapter 7 consumer case, nonexempt property is distributed to priority creditors, with any surplus given to the holders of allowed unsecured claims on a pro rata basis. See 11 U.S.C. §726(a)-(b).[3] In a Chapter 13 case, the debtor must either pay all allowed unsecured claims in full or devote all of his or her projected disposable income to making ratable payments to holders of allowed unsecured claims over a period of three to five years. See 11 U.S.C. §1325(b). In addition, the value of property to be distributed under the Chapter 13 plan on account of allowed unsecured claims must be at least as much as would be paid on such claims in a Chapter 7 liquidation. See 11 U.S.C. § 1325(a)(4).

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[3] Any further remaining surplus belongs to the consumer debtor. 11 U.S.C. §726(a)(6).

B. The Number of Consumer Bankruptcy Cases, Particularly *Pro Se* Cases, Has Increased Significantly Over Time

In the decades since Congress enacted the FDCPA, consumer debt collection activity has increasingly migrated into bankruptcy courts. Annual consumer filings have increased from 287,570 in 1980 (representing 86.81% of all bankruptcy filings that year) to 819,760 in 2015 (representing 97.07% of all bankruptcy filings that year). See American Bankruptcy Institute, *Annual Business and Non-business Filings by Year (1980-2015)*, http://tinyurl.com/filingdata.

A significant portion of these consumer bankruptcy cases are filed by *pro se* debtors. For example, in one of the nation's largest bankruptcy courts, *pro se* debtors filed 24.5% of all bankruptcy cases filed in 2015. See United States Bankruptcy Court for the Central District of California, *Annual Report 2015*, p. 17, http://tinyurl.com/CACBreport.

Unsurprisingly, *pro se* debtors rarely successfully object to claims filed against them, even when the claims are meritless. See, *e.g.*, *In re Edwards*, 539 B.R. 360, 366 (Bankr. N.D. Ill. 2015) (describing several aspects of the objection process that challenge *pro se* debtors and noting that the judge "cannot recall a single *pro se* debtor who has managed this feat in 16 years").

C. Debt Collectors Use Business Models Built on the Bulk Purchase and Assertion of Consumer Debt in Bankruptcy Cases

Consumer debt collection has evolved into its own industry. This industry is built on buying debt from consumer lenders in bulk at a steep discount. The Federal Trade Commission has reviewed "information about debts and debt buying practices from nine of the largest debt buyers that collectively bought 76.1% of the debt sold in 2008," which yielded "data on more than 5,000 portfolios, containing nearly 90 million consumer accounts, purchased during the three-year study period." Federal Trade Commission, *The Structures and Practices of the Debt Buying Industry* (January 2013) (FTC Report), pp. i-ii, http://tinyurl.com/2013FTCreport. Across the data analyzed by this study, "the average price was 4.0 cents per dollar of debt face value." *Id.* at p. ii.

The average price was significantly lower for older debts, particularly those likely to be time-barred. See FTC Report at pp. 23-24 (explaining how the "analysis suggests that debt buyers paid on average 3.1 cents per dollar of debt for debts that were 3 to 6 years old and 2.2 cents per dollar of debt for debts that were 6 to 15 years old compared to 7.9 cents per dollar for debts less than 3 years old"). A material portion of the purchased debt was likely beyond the statute of limitations at the time of sale, see *id.* at pp. 42-43, and the FTC Report concludes "that debt buyers usually are likely to know or be able to determine whether the debts on which they are collecting are beyond the statute of limitations," *id.* at p. 49. Indeed, debt collectors are required to

make this determination not only to properly price the portfolio, but also to comply with the FDCPA's prohibition on asserting stale claims in courts.

Some debt buyers specialize in debts of consumers who have filed for bankruptcy. For example, the FTC Report describes several buyers for which "some or all of the portfolios they had purchased were comprised of debts of consumers who had filed for bankruptcy." FTC Report, Technical Appendix D, p. D-1. These portfolios represented millions of individual accounts and billions of dollars of consumer debt. See *id.* at p. D-3. Other data confirm the very active role of debt buyers in consumer bankruptcy cases. An industry report cited by petitioner (Cert. Pet. 17) reveals numerous debt buyers filing hundreds of thousands of proofs of claim asserting hundreds of millions of dollars of consumer indebtedness, all in a single year. See American InfoSource, *AIS Insight 2015 Year in Review*, pp. 14-15, http://tinyurl.com/2015AISreview.

Bankruptcy judges describe the flood of stale claims filed by professional debt collectors as a "plague" and "a new development that presents a challenge for the bankruptcy system." *E.g.*, *In re Jenkins*, 456 B.R. 236, 239 n.2 (Bankr. E.D.N.C. 2011); *In re Andrews*, 394 B.R. 384, 387 (Bankr. E.D.N.C. 2008).

SUMMARY OF ARGUMENT

A. The filing of proofs of claim for time-barred debts harms consumer debtors, thereby implicating interests the FDCPA exists to protect.

Petitioner's assertion that other creditors are the only parties harmed by its knowing filing of stale claims is false. Petitioner's business model does depend on transferring value away from other creditors, but that transfer directly and adversely affects consumer debtors whenever they do not receive a discharge (as in the majority of Chapter 13 cases) or, like millions of Americans, have nondischargeable debts such as educational loans, domestic support obligations, or certain tax debts. In these cases, all amounts paid on a time-barred debt reduce what gets paid on other debts, which in turn increases the obligations the consumer continues to owe after the bankruptcy case. This is tangible harm inflicted on consumer debtors, the prevention of which is within the FDCPA's scope. Because the triggering events occur after the bankruptcy filing, a consumer's FDCPA lawsuit belongs to the individual debtor, not to the bankruptcy estate. Redressing harm to the consumer remains squarely within the FDCPA's statutory text and purpose.

Petitioner's self-serving assertion that filing time-barred claims promotes a debtor's "fresh start" is spurious. For one thing, the premise is flawed—these debts can be discharged in Chapter 7 and Chapter 13 cases regardless whether any proof of claim is filed. See 11 U.S.C. §§ 523(a)(3)(A), 727(b) & 1328(a). In any event, even if these time-barred debts are not subject to a bankruptcy discharge, they remain unenforceable outside of bankruptcy, and thus their theoretical continued existence has little, if any, effect on any debtor's "fresh start."

B. Because a professional debt collector's filing a lawsuit to collect a plainly time-barred debt violates the FDCPA, so too does that debt collector violate the FDCPA by filing a proof of claim.

Filing a proof of claim for debt that is plainly time-barred is deceptive and misleading under 15 U.S.C. §1692e even though there is no express misrepresentation in the proof of claim. By asserting the claim, the debt collector implicitly affirms the legal enforceability of debt it knows is legally barred, thereby preying on some consumers' unsophistication about their rights. The debt collector deceives and misleads others about the character and legal status of the debt, the acts that can legally be taken regarding the debt, and information that the collector knows or should know to be incorrect. By doing these things, the debt collector violates the FDCPA. See 15 U.S.C. §1692e(2), (5) & (8).

Filing proofs of claim for plainly time-barred debt is also fundamentally unfair under 15 U.S.C. §1692f because, even if no party is deceived, debt collectors exploit the inertia and allocation of costs in the bankruptcy system. Debt collectors shift expenses onto other parties throughout the bankruptcy system while seeking to manipulate that system to extract profits for themselves on unenforceable claims they bought for a tiny fraction of the face amount. This exploitation of the federal bankruptcy courts readily fits within Congress's broad prohibition of all "unfair" means of debt collection by professional debt collectors. Indeed, using the bankruptcy system in this way is even more unfair than seeking to collect through other

courts because of bankruptcy's streamlined claim-filing process and presumptions about claim validity. Absent FDCPA relief, the dispersed parties harmed by this unfairness individually lack the economic means or incentives to stand up to the bully.

C. There is an established framework for analyzing the interplay between two federal statutes. Implicit repeal is disfavored and the Court endeavors to give full effect to both statutes when there is no clear indication that Congress intended to negate one of them. Nothing in the Bankruptcy Code's text, context, or purpose indicates it was intended to repeal or limit the FDCPA.

In truth, negating the FDCPA in bankruptcy cases would be contrary to fundamental principles that measure parties' rights in bankruptcy by otherwise applicable nonbankruptcy law. *Butner* v. *United States*, 440 U.S. 48 (1979), and other cases have long established nonbankruptcy substantive entitlements as the baseline against which the Bankruptcy Code operates. Unless Congress specifically provides otherwise, the Bankruptcy Code preserves and defers to nonbankruptcy entitlements in the claims process. If the FDCPA bars the filing of a time-barred claim in state court, then it should bar that same claim in bankruptcy, too, unless Congress has expressly legislated otherwise (which it has not).

Moreover, this Court has made clear that acts permitted by the Bankruptcy Code generally remain constrained by preexisting laws. See *Midlantic Nat'l Bank* v. *N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 500-504 (1986). If Congress intended to grant debt

collectors the right to file proofs of claim notwithstanding the FDCPA or any other otherwise applicable nonbankruptcy law, then Congress would have said exactly that in Bankruptcy Code §501(a), just as Congress did many times in the Bankruptcy Code. *E.g.*, 11 U.S.C. §§341(c), 526(c)(5), 544(b)(2), 1123(a), 1125(d) & 1142(a). But Congress said nothing of the sort, either in the initial statute or in repeated amendments, leaving no basis to conclude that the Bankruptcy Code precludes or limits relief under the FDCPA. See, *e.g.*, *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236-2241 (2014).

These foundational principles of bankruptcy law defeat petitioner's preclusion argument whether or not an unenforceable demand for payment is a "claim" under the Bankruptcy Code. Even assuming petitioner held a "claim" that potentially could be pursued in a bankruptcy case, nothing in the Bankruptcy Code allows petitioner to choose to file proof of that claim free of *all* consequences that normally attach to its debt collection activities under the FDCPA and other applicable nonbankruptcy law.

ARGUMENT

A. The Filing of Proofs of Claim for Time-Barred Debts Harms Consumer Debtors

Congress enacted the FDCPA in 1977 after receiving "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors" and the resulting harms. 15 U.S.C. §1692(a). The law's express purposes include "*eliminat[ing]* abusive debt collection practices by

debt collectors" and ensuring that "debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e) (emphasis added).

Petitioner and its *amici* contend that consumer debtors suffer no injury from the assertion of time-barred debts in bankruptcy cases, and hence have no FDCPA claim. As explained below, this contention is false, as is the suggestion that the filing of claims for such debts actually helps consumer debtors.

1. *Consumer Debtors Are Injured in Multiple Ways by the Flood of Claims for Time-Barred Debts*

Petitioner asserts that "the allowance of a claim for a time-barred debt will ordinarily have no impact on the debtor" because "an additional allowed claim decreases the amount available to pay other creditors, rather than increasing the amount paid by the debtor." Pet. Br. 14 & 35. This canard echoes throughout the *amicus curiae* briefs. *E.g.*, Resurgent Capital Amicus Br. 3 (asserting that "the total dollar value of allowed claims affects only the relative distributions of value among creditors and does not affect the debtor's obligations").

In actuality, "the relative distributions of value among creditors" adversely affect thousands of consumer debtors in multiple ways.

First, debtors are not agnostic about the allocation of value among creditors unless *all* their debts are discharged. Except in narrow

circumstances, however, a Chapter 13 debtor who defaults under his or her plan will not receive a discharge of *any* debts. See 11 U.S.C. §1328(a)-(b). The failure rate for Chapter 13 plans is very high. See, *e.g.*, *Till* v. *SCS Credit Corp.*, 541 U.S. 465, 493 & 493 n.1 (2004) (Scalia, J., dissenting) (discussing how "Chapter 13 plans often fail" and citing studies suggesting failure rates of nearly 60%, rates that have increased after Congress made substantial amendments to Chapter 13 in 2005); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103, 111-112 (2011) (noting how "knowledge of outcomes of Chapter 13 can largely be reduced to one enduring fact: only one in three cases ends in a Chapter 13 discharge" and summarizing data that nearly 75% of the remaining cases result in no bankruptcy discharge under any chapter, leaving numerous debtors with no debt relief whatsoever and subject to renewed debt collection efforts).

For the millions of Chapter 13 debtors who ultimately obtain no bankruptcy discharge at all, allocations of value among debt collectors pursuing time-barred claims and legitimate creditors have direct financial consequences. Every dollar that is paid on an unenforceable time-barred debt is a dollar not paid on legitimate debts, and hence a dollar that the debtor still owes after the Chapter 13 case is dismissed. This increased continued liability is a tangible and concrete injury suffered by these debtors when debt collectors file claims, and receive recoveries, on account of debts that cannot be enforced outside of bankruptcy.

Second, even when a debtor successfully completes a Chapter 13 plan or files a Chapter 7 case, many kinds of debt are never subject to discharge. See 11 U.S.C. §§523(a) & 1328(a)(2). Among these nondischargeable debts are obligations owed by millions of Americans, and thus by thousands of debtors in bankruptcy cases, including debts for certain unpaid taxes or for domestic support obligations. See 11 U.S.C. §523(a)(1) & (5). A particularly notable category of nondischargeable debt is student loan debt, at least when the high "undue hardship" bar cannot be satisfied. See 11 U.S.C. §523(a)(8). Student loan debt is a major category of debt carried by many Americans, particularly younger Americans. See, *e.g.*, Federal Reserve Board, *G.19 Statistical Release* (Dec. 7, 2016), http://tinyurl.com/FRBdebtdata (reporting nearly $1.4 *trillion* of outstanding student loan debt as of September 2016, substantially more than the outstanding amounts of revolving consumer debt or motor vehicle debt). Accordingly, a significant and growing number of consumer bankruptcy cases will involve student loan debt that is not dischargeable.

For debtors with student loans or other nondischargeable debts, the harmful consequence of "the relative distributions of value among creditors" mirrors that described above: every dollar received by debt collectors pursuing time-barred debts is a dollar not paid to other creditors, including creditors holding nondischargeable debts. The end result for the debtor is that the obligations surviving the bankruptcy are larger than they would be without time-barred claims diluting all creditors' recoveries.

Third, although such cases are uncommon, the Bankruptcy Code contemplates Chapter 7 cases in which surplus amounts remain for the debtor. See 11 U.S.C. §726(a)(6). Similarly, some Chapter 13 debtors, including those who want to keep their house and any associated nonexempt equity, may have no option but to propose and attempt to complete a plan that pays unsecured creditors in full. See 11 U.S.C. §1325(a)(4) & (b)(1)(A). For both categories of debtors, payments on account of time-barred debts reduce, dollar-for-dollar, the value that would otherwise be retained by the debtor, thereby harming the debtor.

Fourth, as discussed at pages 26-28, *infra*, debt collectors' flooding of the bankruptcy system with claims for time-barred debts imposes a *de facto* tax on the entire system. That tax ultimately will increase the costs of the bankruptcy process generally, which in turn increases the fees paid by consumer debtors filing bankruptcy cases.

Because the filing and allowance of claims for time-barred debts harms consumer debtors in multiple respects, they appropriately have standing to pursue a FDCPA lawsuit. See 15 U.S.C. §1692k(a). And because this lawsuit arises entirely from events occurring *after* the bankruptcy filing, the lawsuit is not among the "legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. §541(a)(1), that only a bankruptcy trustee may pursue. See, *e.g.*, *In re Witko*, 374 F.3d 1040, 1043-1044 (11th Cir. 2004) (holding that cause of action that did not exist on petition date is not estate property); *In re*

Rhinesmith, 450 B.R. 630, 636 (Bankr. W.D. Tex. 2011) (same, and specifically including individual debtors' FDCPA lawsuits). Although there is an expanded estate in Chapter 13 cases, debtors in those cases nevertheless remain in possession of causes of action or similar estate property, 11 U.S.C. §1306(b), and can retain their causes of action as long as the plan confirmation requirements are otherwise met. There ultimately is no tension in bankruptcy law or the FDCPA itself if consumer debtors are permitted to sue to redress post-bankruptcy injuries from which the FDCPA is designed to protect them.[4]

2. *The Filing of Claims for Time-Barred Debt Does Not Advance a "Fresh Start"*

Petitioner and its *amici* maintain that permitting proofs of claim to be filed based on stale debts promotes the debtor's fresh start, and thus "will often be affirmatively beneficial" for consumer debtors. *E.g.*, Pet. Br. 35; ACA Int'l Amicus Br. 22-

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[4] It may be that bankruptcy estates have separate claims under the FDCPA that trustees *also* may pursue to recover actual damages sustained by those estates (such as any incremental administrative expenses devoted to what should be unnecessary claim objections). The statute plainly does not restrict FDCPA actions to only "natural persons." See 1 U.S.C. §1 (defining "person" to include various legal entities *and* individuals); 15 U.S.C. §§1692a(3) ("consumer" definition limited to "natural persons"), 1692a(6) ("debt collectors" defined as "persons" generally), 1692k(a)(1) (remedy available for "persons" generally). Cf. Chamber of Commerce Amicus Br. 23. This issue, however, is not before the Court.

26. It is unworthy of belief that professional debt collectors are acting for the protection of consumers by filing proofs of claim against them to ensure that their otherwise unenforceable debts are thereby discharged. In any event, this premise is false.

First, the Chapter 7 discharge generally applies to all pre-bankruptcy debts, "whether or not a proof of claim based on any such debt or liability is filed under section 501." 11 U.S.C. §727(b). Debts that the debtor does not schedule might nevertheless be excepted from discharge, but *not* when the creditor "had notice or actual knowledge of the case in time for [a] timely filing" of a proof of claim. 11 U.S.C. §523(a)(3)(A). Thus, if a debt collector has knowledge of the bankruptcy case such that it *could* have filed a timely proof of claim (which knowledge is necessary for professional debt collectors' business practice of filing claims for stale debts in the first instance[5]), the underlying debt will be discharged *whether or not* the debt collector actually files a claim.

Second, the Chapter 13 discharge encompasses "all debts provided for by the plan," such as general

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[5] Absent a flaw in their computerized databases, professional debt collectors are always aware of the consumer's bankruptcy filing soon after a petition is filed. Several commercial services such as Banko® (currently offered by LexisNexis) and AACER® (Automated Access to Court Electronic Records) will notify their customers (creditors and professional debt collectors) of bankruptcy filings that match names or accounts provided to the services. See, *e.g.*, LexisNexis, *Banko® Solutions* (last visited Dec. 20, 2016), http://tinyurl.com/bankoLN.

unsecured claims generally. 11 U.S.C. §1328(a). Chapter 13 plans can be drafted to accommodate an omission of creditors from the debtor's initial scheduled claims or notice lists. See, *e.g.*, *In re Moore*, 247 B.R. 677, 684-689 (Bankr. W.D. Mich. 2000). Accordingly, in scenarios where the debtor does not initially schedule a time-barred debt, steps may nevertheless be taken to include that debt within a Chapter 13 discharge.

Third, as a practical matter, "discharge" *vel non* of a time-barred debt is generally irrelevant. Even if the debt theoretically survives after bankruptcy, the creditor is unable to enforce that debt outside of bankruptcy, and hence the debt's survival does nothing to impair the debtor's fresh start. Moreover, like the bar of a statute of limitations, the bankruptcy discharge does not *extinguish* the underlying debt, but instead only limits the debtor's personal liability for that debt. See, *e.g.*, 11 U.S.C. §524(a); *Johnson* v. *Home State Bank*, 501 U.S. 78, 82-85 (1991).

Accordingly, in most instances consumer debtors will obtain bankruptcy discharges of stale debts regardless whether those debts were scheduled or asserted in proofs of claim. In any event, these debtors still enjoy protections under the FDCPA and applicable state law after the bankruptcy case. It is untenable to suggest that the bankruptcy system and consumer debtors should embrace professional debt collectors filing unenforceable proofs of claim in order to protect the debtor's discharge.

B. Filing Proofs of Claim Based on Time-Barred Debts Violates Multiple Sections of the FDCPA

Filing a proof of claim in a bankruptcy case is a method of judicial debt collection. The proof of claim's basic function is to assert the debtor's liability on a claim—*i.e.*, a "debt," 11 U.S.C. § 101(12); accord 15 U.S.C. § 1692a(5)—and seek payment on that debt from the debtor's bankruptcy estate. Longstanding authority reflects that proofs of claim are the bankruptcy equivalent of civil complaints. See, *e.g.*, *In re Am. Anthracite & Bituminous Coal Corp.*, 22 F.R.D. 504, 507 (S.D.N.Y. 1958); 9 *Collier on Bankruptcy* ¶ 3007.01[3] & n.40, p. 3007-7 (noting the analogy and citing multiple supporting circuit court opinions). Indeed, decades before the FDCPA was drafted, this Court described the filing of a proof of claim as "a traditional method of collecting a debt," *Garner* v. *New Jersey*, 329 U.S. 565, 573 (1947), and any asserted "creditor" status necessarily invokes "a claim against the debtor," 11 U.S.C. § 101(10)(A).[6] A

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[6] The Chamber of Commerce is wrong when it suggests that a proof of claim's attempt to collect on a debt against the debtor invokes the automatic stay and puts the Bankruptcy Code "at war with itself." See Amicus Br. 22-23. "[T]he automatic stay serves to protect the bankruptcy estate from actions taken by creditors outside the bankruptcy court forum, not legal actions taken within the bankruptcy court." *In re Sammon*, 253 B.R. 672, 681 (Bankr. D.S.C. 2000). See also, *e.g.*, *In re Atreus Enters., Ltd.*, 120 B.R. 341, 346 (Bankr. S.D.N.Y. 1990) (explaining how the automatic stay is inapplicable to acts "in the bankruptcy court where the debtor's bankruptcy case is pending").

person who regularly files proofs of claim against consumer debtors thus readily falls within the FDCPA's broad definition of "debt collector." See 15 U.S.C. § 1692a(6); *Heintz* v. *Jenkins*, 514 U.S. 291, 294 (1995) (explaining how the definition's plain meaning encompasses someone "who regularly tries to obtain payment of consumer debts through legal proceedings"). Accordingly, such a person violates the FDCPA by engaging in any of the conduct described in § 1692e or § 1692f.

1. *Filing Claims Known to Be Time-Barred Is Deceptive and Misleading*

The FDCPA generally prohibits debt collectors from using "any false, deceptive, *or* misleading representation or means in connection with the collection of any debt" and includes a non-exclusive list of sixteen *per se* violations of this general prohibition. 15 U.S.C. § 1692e (emphasis added). This comprehensive statute deliberately "imposes open-ended prohibitions" on debt collectors' conduct. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 587 (2010). Indeed, the FDCPA uses very broad and general prohibitions specifically to "enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed" by the *per se* examples. See S. Rep. No. 95-382, p. 4 (1977).

Because the FDCPA does not define the words "deceptive" or "misleading," it is appropriate to look to their ordinary dictionary meaning. See, *e.g.*, *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014); *Jerman*, 559 U.S. at 587. The ordinary meaning of a

"deceptive" act is one that makes a person believe what is not true or misleads. See Webster's Second New World Dictionary 365 (1972). Similarly, a "misleading" act is one that leads in a wrong direction, leads astray, or leads into wrongdoing. See *id.* at 909.

Filing a proof of claim for a time-barred debt can deceive consumers into believing that the stale debt remains legally enforceable notwithstanding the passage of time. Consumers are unlikely to know the length of the applicable statute of limitations in the jurisdiction in which they reside, much less under whatever contractual choice of law the original creditor imposed on the consumer.[7] Even when the objection is being pursued by debtor's counsel or a

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[7] The Chamber of Commerce suggests analysis regarding the applicable statute of limitations is extremely complicated and difficult even for professional debt collectors. See Amicus Br. 12-15. But cases requiring complex analysis are rare and debt collectors already have to do the *exact same* analysis outside of bankruptcy. If other *amici* are to be believed, debt collectors have procedures that make compliance straightforward. See, *e.g.*, DBA Int'l Amicus Br. 1-4 (describing how "the Program" prohibits debt collectors such as petitioner from bringing civil lawsuits on stale debts). Throughout its brief, the Chamber of Commerce conjures a parade of horribles, all of which are belied by the practices and realities of actual debt collectors. In any event, debt collectors with businesses built on collecting consumer debt are far better situated to absorb the costs of analyzing the applicable statute of limitations than individual consumers or bankruptcy trustees; indeed, already debt collectors must do this analysis to accurately price the portfolios they acquire.

bankruptcy trustee, the objector must obtain a copy of the underlying agreement from the debt collector, see Fed. R. Bankr. Proc. 3001(c)(3)(B), determine the applicable law governing the limitations period, obtain the underlying payment history, and otherwise confirm the proof of claim form's asserted facts with the debtor.

Until this deeper analysis is done, the proof of claim standing alone suggests that there is a valid debt entitling its holder to participate in ratable distributions from the bankruptcy estate, particularly since the proof of claim is filed under oath and subject to criminal prosecution for a false claim. 18 U.S.C. §§ 152 & 3571; Official Form B 410. Filed proofs of claim thus promote the mistaken belief that they present allowable claims, and, moreover, often result in payment of stale claims that properly should be disallowed. This is particularly likely in tens of thousands of bankruptcy cases involving *pro se* debtors. Because these time-barred proofs of claim have a tendency to mislead other parties into believing that an unenforceable debt remains legally enforceable, they are "deceptive" and "misleading" representations and means of debt collection as those words are commonly understood.

Any doubt about this conclusion is dispelled by the *per se* examples in § 1692e. Subsection (2)(A) prohibits false representations about "the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). A proof of claim based on a time-barred debt falsely represents the character and legal status of the underlying debt by suggesting the debt entitles

the holder to an allowed claim in bankruptcy when the debt collector knows that debt is time-barred. Similarly, subsection (5) limits threats "to take any action that cannot legally be taken." 15 U.S.C. §1692e(5). A debt collector cannot legally enforce a time-barred debt outside of bankruptcy, but threatens (and indeed demands) such enforcement by filing a proof of claim in bankruptcy. Finally, subsection (8) prevents the communication "to any person [of] credit information which is known or which should be known to be false," 15 U.S.C. §1692e(8), but the proof of claim incorrectly communicates to everyone in the bankruptcy case that its filer has an enforceable claim. See also 15 U.S.C. §1692a(2) (broadly defining the term "communication").

Each of these subsections illuminates the broader meaning of the FDCPA terms "deceptive" and "misleading." See, *e.g.*, *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013) (applying *noscitur a sociis* canon to give meaning to a word by reference to its "statutory neighbors"); *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Because the filing of a proof of claim based on a time-barred debt bears a striking similarity to acts subject to at least three of the *per se* examples in §1692e, it is apparent that such conduct falls within the statute's more-generalized prohibitions on any "deceptive" or "misleading" representations or means of debt collection.

2. *Flooding the Bankruptcy System with Time-Barred Claims Is an Unfair Practice*

The FDCPA separately prohibits debt collectors from using any "unfair or unconscionable means to collect or attempt to collect any debt," including eight specific *per se* violations. 15 U.S.C. § 1692f. As explained above, the general prohibition intentionally uses flexible language.

Once again, the word "unfair" is not defined by the FDCPA. The word's ordinary meaning encompasses anything that is "not fair," including acts that are broadly "inequitable" or "unethical in business dealings." Webster's Second New World Dictionary 1550 (1972). Indeed, as this Court explained when considering the meaning of the same word in a different federal statute, "in measuring a practice against the elusive, but congressionally mandated standard of fairness," it is appropriate to consider public values and public policy generally. See *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 & 244 n.5 (1972).

The business model used by petitioner and similar firms of flooding bankruptcy courts with thousands of stale claims is a fundamentally unfair means of attempting to collect consumer debt in several respects.

First, even when the claim objection process works in a theoretically perfect fashion, the mass filing of time-barred claims imposes substantial costs on parties throughout the bankruptcy system but is

virtually costless for the filing party. Once such claims are filed, the burden falls on the bankruptcy trustee, the debtor, or other creditors to devote resources to researching, drafting, filing, serving, and prosecuting a claim objection. This work is not costless or necessarily straightforward; parties or their attorneys must devote limited time, money, and other resources to the effort. These costs are incurred to eliminate proofs of claim that never should have been filed—other parties are effectively left to dispose of garbage strewn about by the debt collectors, and to do so at their own expense. When aggregated, these expenses amount to a tariff foisted on the entire bankruptcy system, one that ultimately will increase the cost of accessing that system for all consumer debtors.

A more formalized way of explaining what debt collectors do by flooding the system with stale proofs of claim is that they produce negative externalities for parties throughout the entire bankruptcy system and force consumer debtors, consumer bankruptcy attorneys, bankruptcy trustees, and other parties to absorb those negative externalities. The legal system checks similar negative externalities by imposing tort liability or regulatory charges that compensate third parties affected by the externality, thereby forcing the actor to internalize its externalities and regulate its conduct accordingly. See, *e.g.*, *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); *Boomer* v. *Atl. Cement Co.*, 26 N.Y.2d 219, 225-228 (1970); *People* v. *Rubenfeld*, 254 N.Y. 245, 248-249 (1930). The courts can eliminate the significant negative externalities imposed

throughout the bankruptcy system when debt collectors pollute the system with stale, unenforceable claims by treating that conduct as "unfair" under § 1692f, thereby exposing the debt collectors to liability under § 1692k.

The FDCPA's structure recognizes that, absent an attorney's-fee-shifting provision, it is uneconomic to pursue litigation over small amounts. See 15 U.S.C. § 1692k(a)(3). This fee-shifting provision exists to facilitate Congress's desire for the FDCPA to be "primarily self-enforcing." See S. Rep. No. 95-382, p. 5 (1977). The bankruptcy claim objection process does not usually involve such fee shifting, however, and hence does not require debt collectors to absorb the negative externalities they produce by filing meritless proofs of claim. Thus, continued application of the FDCPA in this context is necessary for that statute to serve one of its primary functions.

Second, as debt collectors are well aware, the claim objection process does not actually work in a theoretically perfect fashion. It often is economically irrational for anyone to object to certain proofs of claim, even when those claims are subject to ready disallowance. See note 2, *supra*. In other instances, including many cases involving *pro se* debtors, proofs of claim that should be disallowed will simply be missed or "fall through the cracks." In either scenario, the end result is that a debt collector holding an unenforceable debt receives some recovery on that debt, all at the expense of other, legitimate creditors and the debtor. This rent-seeking behavior comes at the expense of the very parties the FDCPA is intended to protect—

consumers *and* "those debt collectors who refrain from using abusive debt collection practices," 15 U.S.C. § 1692(e).

Third, debt collectors such as petitioner are abusing and degrading the federal judicial system itself. When bankruptcy courts are required to devote their limited time and resources to processing what should be unnecessary claim objections, they too are subjected to externalities imposed without consequence by debt buyers flooding the system with stale claims. What is worse, however, is that the judicial system is utilized as a mechanism to extract profits for debt collectors from legally unenforceable debts; a federal system designed to afford a fresh start for honest debtors is manipulated to collect money that would never be paid in the absence of a bankruptcy filing. It is unsurprising that judges find this conduct to be "an abuse of the claims allowance process and an affront to the integrity of the bankruptcy court." *In re Feggins*, 535 B.R. 862, 868 (Bankr. M.D. Ala. 2015).

Petitioner's business model of flooding bankruptcy courts with many thousands of stale claims is simply *wrong*. It (i) imposes significant economic and noneconomic costs on countless consumer debtors, their bankruptcy trustees, their bankruptcy attorneys, and their innocent creditors; (ii) extracts recoveries on unenforceable debts that should be disallowed by exploiting the basic fabric of the bankruptcy claims process; and (iii) needlessly wastes the limited time and resources of the federal judiciary and undermines the proper function and integrity of the court system. Such a business model

is indeed a "plague" on the bankruptcy system itself. See *In re Jenkins*, 456 B.R. 236, 239 n.2 (Bankr. E.D.N.C. 2011). Once all these considerations are combined, it is beyond dispute that this entire business is deeply *unfair*. When it enacted the FDCPA, Congress gave the courts an extremely broad charge to eliminate all unfair means of debt collection, and the Court should hold that the practices of petitioner and similar firms are within that prohibited conduct.

C. Nothing in the Bankruptcy Code's Text, Structure, or Purpose Precludes or Otherwise Limits the FDCPA's Application in Bankruptcy Cases

When analyzing the interplay between two federal statutes, this Court starts from the premise "that repeals by implication are disfavored." *E.g.*, *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974) (citing several cases). Under this canon, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). The Court thus reviews the two federal statutes to determine whether they conflict or can complement each other. See, *e.g.*, *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236-2241 (2014); *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-144 (2001).

The FDCPA's text makes no reference to the Bankruptcy Code and vice versa. As detailed below, the structure and purpose of both the claims-allowance process and the Bankruptcy Code more generally are entirely consistent with giving the FDCPA full effect as a co-equal federal statute governing consumer debt collection activities that happen to occur in bankruptcy.

1. *The Bankruptcy Code and Bankruptcy Policy Compel Symmetry Between the Claims Process and Nonbankruptcy Outcomes*

Petitioner's position that the FDCPA categorically does not apply to the bankruptcy claims process requires a deep asymmetry in the law—conduct that is prohibited outside of bankruptcy (pursuing consumers in court to collect time-barred debt) suddenly becomes permissible because of the happenstance of a bankruptcy filing. This construct is fundamentally at odds with how this Court has approached the bankruptcy claims process for decades.

Starting with *Butner* v. *United States*, 440 U.S. 48 (1979), the Court has made clear that creditors' entitlements in bankruptcy should mirror their nonbankruptcy entitlements unless the Bankruptcy Code expressly requires a different result. Thus, in *Butner*, the rights of a second mortgagee to rents collected during the period between the mortgagor's bankruptcy and a foreclosure sale of the property was determined by nonbankruptcy law. As the Court explained, "there is no reason why such interests

should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* at 55. A symmetrical approach "serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Ibid.* (quoting *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961)).

The Court has reiterated this rule in the context of the burden of proof associated with a bankruptcy claim, *Raleigh* v. *Ill. Dep't of Revenue*, 530 U.S. 15, 20-22 (2000), the rights of a home mortgage lender, *Nobelman* v. *Am. Sav. Bank*, 508 U.S. 324, 329-330 (1993), and the bases on which bankruptcy claims may be disallowed, *Travelers Cas. & Sur. Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 449-451 (2007). The rule is a cornerstone of modern United States bankruptcy law. See, *e.g.*, Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 21-27 (Harvard 1986); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815, 818 n.3 (1987). The rule complements the longstanding principle that a bankruptcy estate consists of all property rights that the debtor holds under otherwise applicable nonbankruptcy law. See, *e.g.*, Kenneth N. Klee & Whitman L. Holt, *Bankruptcy and the Supreme Court: 1801-2014* 204-207 (West Academic 2015) (discussing this principle and numerous supporting authorities dating back to 1878).

The *Butner* rule also fits with the broader function of the bankruptcy system. "Bankruptcy is basically a procedural forum designed to provide a

collective proceeding for the sorting out of non-bankruptcy entitlements." *In re Worcester*, 811 F.2d 1224, 1228 (9th Cir. 1987). With limited exceptions, federal bankruptcy law does not reorder or invent new legal rights; instead it channels debtors and creditors into a single court to efficiently administer assets and liabilities created by nonbankruptcy law.

Petitioner's position flies in the face of these foundational principles. Debt collectors who otherwise are constrained by the FDCPA obtain unique rights solely by reason of the happenstance of bankruptcy. In many cases, those parties will receive payments they otherwise could not obtain—"windfalls"—only because the debtor filed a bankruptcy petition.

Nothing in the Bankruptcy Code's text, context, or purpose indicates that Congress desired this radical asymmetry between bankruptcy outcomes and nonbankruptcy outcomes. Nor is there any logical reason—let alone some compelling federal interest—why Congress would have created such an asymmetry. Allowing debt collectors to file time-barred proofs of claim does not advance any bankruptcy purpose; it does not centralize or expedite the collection of the debtor's assets, facilitate equal distributions to similarly-situated creditors, or advance the debtor's fresh start. Indeed, if any "federal interest" is implicated, it is only the interest expressed in the FDCPA—*eliminating* abusive debt collection practices, regardless the context in which they occur, see 15 U.S.C. § 1692(e).

2. *The Bankruptcy Code Operates Against a Backdrop of Preexisting Laws, Which Remain Effective Unless Expressly Negated*

Congress did not draft the Bankruptcy Code in a vacuum. Instead, Congress enacted the 1978 Bankruptcy Code against a backdrop of preexisting laws—including the FDCPA, which was enacted only a year earlier—and has subsequently amended the Bankruptcy Code in the face of updated and additional laws.

Absent a contrary statement by Congress, these other laws may impose limitations on options available under the Bankruptcy Code. For example, in *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), the Court analyzed whether the Bankruptcy Code permits a trustee to abandon property in contravention of state environmental laws. Despite unqualified text stating that the trustee "may" abandon certain property of the estate, 11 U.S.C. §554(a), the Court concluded that the trustee's abandonment power remains "limited by a judicially developed doctrine intended to protect legitimate state or federal interests." See 474 U.S. at 500-504. Crucial to this conclusion was the fact that Congress would have been aware of the preexisting law (in *Midlantic*, principles developed through case law, rather than a co-equal federal statute), and thus Congress would have clearly expressed any intent to create "an extraordinary exemption from nonbankruptcy law" when drafting the statute. *Id.* at 501. See also, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498

U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

In fact, the Bankruptcy Code is filled with examples of Congress expressly precluding or displacing other laws. Several sections of the Bankruptcy Code pointedly operate notwithstanding "any otherwise applicable nonbankruptcy law." See 11 U.S.C. §§341(c), 1123(a), 1125(d) & 1142(a).[8] Other sections explicitly negate contrary "Federal law." See 11 U.S.C. §§526(c)(5) & 544(b)(2). Still other sections supplant the provisions of "applicable law" or even "law" generally. See 11 U.S.C. §§365(e)(1), 365(f)(1) & (3), 704(c)(2)(B), 1106(c)(2)(B), 1202(c)(2)(B) & 1302(d)(2)(B).

If Congress intended to give debt collectors *carte blanche* when filing proofs of claim, Congress easily could have used any of the preceding formulations in Bankruptcy Code §501(a). But the text says nothing of the sort. Instead, as in *Midlantic*, §501(a) merely states what a party "may" do in the bankruptcy case and says nothing at all about precluding or superseding the FDCPA or any other law. The fact that Congress knows how to displace other laws via the Bankruptcy Code—and in fact did so repeatedly—indicates that Congress intended *not* to give §501(a) such effect. See, *e.g.*, *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013); *Russello* v. *United States*, 464 U.S. 16, 23 (1983). It will sow

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[8] This phrase encompasses any applicable federal statutes—such as the FDCPA—as well as state laws. See *Patterson* v. *Shumate*, 504 U.S. 753, 758-759 (1992).

uncertainty to find the FDCPA (or potentially any number of other federal statutes) inapplicable in the bankruptcy context absent textual support for that result in the operative parts of the Bankruptcy Code.

The conclusion that Congress never intended the Bankruptcy Code to limit the FDCPA's reach is made stronger by the fact that both statutes have been amended repeatedly since their respective enactment in the late 1970s. Congress has had numerous opportunities to amend the FDCPA to categorically except bankruptcy proofs of claim from that statute or to modify the Bankruptcy Code to let debt collectors file proofs of claim without liability under otherwise applicable nonbankruptcy law. Congress never added such a provision to either statute notwithstanding Congress's consideration and enactment of many other provisions limiting consumers' rights under the Bankruptcy Code in various other respects.[9] Given these repeated amendment opportunities, the absence of any "textual provision in either statute" revealing an intent to limit the FDCPA's application in the bankruptcy context has "special significance" and

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[9] For example, in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress added language to Bankruptcy Code §341(c) allowing creditors holding consumer debt to appear and participate in the initial meeting of creditors without an attorney notwithstanding "any otherwise applicable nonbankruptcy law" that would require representation of those creditors by an attorney. See Pub. L. No. 109-8, §413, 119 Stat. 23, 107 (2005). It would have been simple to add a similar sentence to Bankruptcy Code §501(a).

provides "powerful evidence" that there is nothing precluding full application of the FDCPA when a debt collector files a proof of claim for a time-barred debt. See *POM Wonderful*, 134 S. Ct. at 2237-2238.

In sum, nothing in either statute suggests Congress intended that the Bankruptcy Code would render the FDCPA inapplicable in the bankruptcy context. If Congress had intended to negate the FDCPA's operation, it would have been easy for Congress to do so. In the absence of such a provision, the mere fact that debt collectors "may" file proofs of claim in bankruptcy cases does not give them a right to do so with impunity and in disregard of other law. Rather, just as with trustees who "may" abandon property under §554(a), debt collectors remain subject to preexisting law, including a federal statute that sits in a co-equal position with the Bankruptcy Code. See *Midlantic*, 474 U.S. at 500-504.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT

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Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (2010), *available at* goo.gl/vBXnPD 11

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INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., a national consumer advocacy organization founded in 1971, appears on behalf of its members before Congress, executive agencies, and the courts on a wide range of issues. Public Citizen has long advocated for the effective enforcement of consumer-protection laws, including the Fair Debt Collection Practices Act (FDCPA). Its attorneys have served as counsel for parties in cases before this Court arising under titles of the Consumer Credit Protection Act, *e.g.*, *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166 (2013) (FDCPA); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (Fair Credit Reporting Act); *Koons Buick v. Nigh*, 543 U.S. 50 (2004) (Truth in Lending Act), and have argued appeals in the lower courts in which consumers successfully defeated attempts by debt collectors to rely on novel defenses to FDCPA liability.

The Legal Aid Society of the District of Columbia (Legal Aid) was formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Today Legal Aid is the oldest and largest general civil legal services provider in the District of Columbia. Legal Aid advocates on behalf of its clients to preserve affordable housing, ensure access to critical safety net benefits, protect consumer rights, and keep families safe and stable. As part of its consumer law practice, Legal Aid represents consumers in debt collection matters filed in District of Columbia courts.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for both parties are on file with the Clerk.

Through this on-the-ground work, Legal Aid attorneys regularly encounter consumers who have been subjected to a variety of abusive debt collection tactics, including unfair practices covered by the FDCPA, but who lack the means or sophistication necessary to recognize and enforce their rights.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice or area of study involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members and consumers in the ongoing struggle to curb unfair and oppressive business practices. Compliance with the FDCPA and faithful application of this law as Congress wrote it have been a continuing focus of NACA since its inception. Protection of the consumers for whose benefit Congress adopted the FDCPA is one of NACA's goals, both within the consumer finance field as well as the larger arena of the consumer rights movement. NACA has appeared regularly as amicus curiae before federal courts of appeals and has appeared before this Court on several occasions.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focused on the legal needs of consumers, especially low-income and elderly consumers. For more than 45 years, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned

for legal answers, policy analysis, and technical and legal support. NCLC is author of the acclaimed twenty-volume Consumer Credit and Sales Legal Practice Series. The FDCPA has been a major focus of NCLC's work. NCLC publishes Fair Debt Collection (8th ed. 2014), a comprehensive treatise to assist attorneys and debt collectors in complying with the law. NCLC's Model Consumer Credit Code was the foundation for the FDCPA. NCLC has appeared regularly as amicus curiae before federal courts of appeals and has appeared before this Court on several occasions.

Amici are concerned that petitioner Midland Funding's reading of the FDCPA, if adopted, would not only harm consumers in bankruptcy, but could also upset decades of lower-court precedent with respect to the FDCPA's application to litigation filings and the appropriate standard under the FDCPA for determining whether a representation is deceptive or misleading. We submit this brief to address questions that may arise in the case involving the FDCPA's proper interpretation.

SUMMARY OF ARGUMENT

The FDCPA prohibits abusive debt collection practices by debt collectors. 15 U.S.C. §§ 1692c-1692j. It is enforced in part through a private right of action that may be asserted by injured "person[s]" seeking actual and statutory damages. *Id.* § 1692k(a). As relevant here, the FDCPA bars debt collectors from using "any false, deceptive, or misleading representation or means" in collecting a debt, *id.* § 1692e, including a false representation of the "character, amount, or legal status of any debt," *id.* § 1692e(2)(A). The FDCPA also prohibits the use of "unfair or unconscionable means to collect or attempt to collect" a debt. *Id.* § 1692f.

Midland Funding effectively concedes that under well-established lower-court precedent, a knowing attempt to collect respondent Aleida Johnson's time-barred debt through debt-collection litigation would violate the FDCPA. *See* Pet'r Br. 31-32, 34. Many courts considering the bankruptcy-related questions presented here have relied on the case law from the non-bankruptcy litigation context. In this case, to the extent this Court addresses the issue, it should adopt the uniform consensus of lower courts that litigation filings otherwise falling within the statute's prohibitions give rise to FDCPA liability, and that a knowing attempt to collect stale debt in consumer debt-collection litigation—a scenario often deemed analogous to the filing of time-barred proofs of claim in bankruptcy—violates the FDCPA.

In addition, this Court should reject Midland Funding's position that the proper standard for assessing whether a litigation filing—such as a proof of claim—is deceptive or misleading under section 1692e of the FDCPA is what a competent attorney or trustee would believe. Proofs of claim filed in bankruptcy may or may not be read by competent professionals; indeed, as respondent points out, Midland Funding's business model is built on the assumption that no competent attorney or trustee will review its proofs of claim. Importantly, a proof of claim is unquestionably directed not only at the estate and the debtor's attorney (if she has one), but also at the debtor herself. There is thus no basis for ratcheting up the standard for FDCPA liability, which is intended to protect unsophisticated consumers, as well as shrewd ones.

ARGUMENT

I. If This Court Addresses the Issue, It Should Confirm That Litigation Filings, Including Suits over Stale Claims, Can Violate the FDCPA.

Midland Funding effectively concedes that under established case law an attempt to collect Johnson's indisputably time-barred debt by filing a debt-collection suit against her would violate the FDCPA. Many courts holding that the filing of a time-barred proof of claim in bankruptcy violates the FDCPA have drawn support from FDCPA case law involving the filing of consumer debt-collection suits over stale claims. The parties in this case part ways only as to whether the distinctive statutory framework of bankruptcy justifies different treatment for proofs of claim than for non-bankruptcy litigation filings.

Although the parties do not dispute the case law involving non-bankruptcy litigation filings, and the correctness of that case law is not directly presented, an understanding of the reasons for the lower courts' decades-old consensus will be helpful to the Court in understanding why the same principles dictate a ruling for respondent here. Such liability is necessary in both non-bankruptcy and bankruptcy contexts to protect consumers and discourage debt collectors from abusing the legal process as an extension of their abusive debt collection tactics.

A. As an initial matter, it is well-established that FDCPA liability may attach to statements made in litigation filings.

In *Heintz v. Jenkins*, 514 U.S. 291 (1995), in the course of construing the FDCPA's definition of "debt collector," this Court held that the FDCPA covers attorneys "engage[d] in consumer-debt-collection

activity, even when that activity consists of litigation." *Id.* at 299. Although *Heintz* involved a settlement-related letter written during litigation, *Heintz*'s rationale assumed that FDCPA liability may arise from statements in pleadings. The debt collector in *Heintz* argued that, were the FDCPA applied to lawyers engaged in litigation, attorneys who file an unsuccessful complaint to collect a debt would violate the statute's prohibition of "'threat[s] to take action that cannot legally be taken'" in collecting a debt. 514 U.S. at 295 (quoting 15 U.S.C. § 1692e(5)). Had the Court intended its opinion to reach only attorneys engaged in litigation activity *outside* of court, the obvious response to this hypothetical would have been that the filing of a complaint cannot form the basis for an FDCPA violation. Instead, the Court pointed out that the statute contains a defense for bona fide errors, and it stated that it could not "see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'" *Id.* at 295-96.

This Court's opinion in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), further confirms that unfair or misleading attempts to collect a debt by filing a lawsuit can violate the FDCPA. The plaintiff in *Jerman* alleged that a law firm and one of its attorneys violated the FDCPA, 15 U.S.C. § 1692g, by stating in a notice attached to a foreclosure complaint that the borrower's debt would be assumed valid unless she disputed it in writing. 559 U.S. at 579. The law firm asserted that it was entitled to a bona fide error defense under section 1692k(c) because it had misunderstood the law with respect to the FDCPA's process for disputing a debt. This Court interpreted the proper scope of that defense without questioning whether a statement in a notice attached to a complaint could violate the FDCPA.

See id. at 581-90. And it rejected the contention that a narrow reading of the bona fide error defense would impose FDCPA liability on lawyers for advancing uncertain legal arguments, *see id.* at 596-97, on the ground that lawyers could still invoke the defense "where a violation results from a qualifying factual error," *id.* at 599.

Based in part on these decisions, the courts of appeals have consistently held that litigation filings may give rise to FDCPA liability. *See, e.g.*, *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 176 (3d Cir. 2015) (rejecting argument "that pleadings—in particular, foreclosure complaints—cannot be the basis of FDCPA claims"); *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1295 (11th Cir. 2015) (holding that "documents filed in court in the course of judicial proceedings to collect on a debt, like [a debt collector's] sworn reply, are subject to the FDCPA"); *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 535 (6th Cir. 2014) (stating that "[c]ourt filings can be a threat under the FDCPA" within the meaning of section 1692e(5) and holding that the plaintiff stated claims under sections 1692e(5) and 1692f where the defendant improperly filed a judgment lien); *James v. Wadas*, 724 F.3d 1312, 1316 (10th Cir. 2013) (recognizing that "the FDCPA applies to the litigating activities of lawyers, which, as other circuits have held, may include the service upon a debtor of a complaint to facilitate debt collection efforts" (internal quotation marks and citation omitted)); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010) (refusing, in a case involving claims under sections 1692e and 1692f, "[t]o limit the litigation activities that may form the basis of FDCPA liability to exclude complaints served personally on consumers to facilitate debt collection"); *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 229-30 (4th Cir. 2007) (holding

that statements in a motion for summary judgment could give rise to liability under sections 1692e and 1692f of the FDCPA).

B. For nearly three decades, courts have also "uniformly" recognized that the FDCPA bars a debt collector from knowingly filing or threatening to file a consumer debt-collection suit to collect a stale debt. *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259-60 & n.6 (11th Cir. 2014); *see Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507, 513-14 (5th Cir. 2016); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948-49 (9th Cir. 2011); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011) (per curiam); *Castro v. Collecto, Inc.*, 634 F.3d 779, 783 (5th Cir. 2011); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001); *see also Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 332 (6th Cir. 2006) (noting the uniformity of other circuits' case law without addressing the question); *Mavilla v. Absolute Collection Serv., Inc.*, 539 F. App'x 202, 207 (4th Cir. 2013) (holding without elaboration that where a debt collector did not at least threaten to file a lawsuit to recover stale debts, a district court properly granted summary judgment to the collector).[2]

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[2] *See also, e.g., Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 632 F. Supp. 2d 842, 845 (N.D. Ill. 2009); *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 875-76 (N.D. Ill. 2009); *Jenkins v. Gen. Collection Co.*, 538 F. Supp. 2d 1165, 1172 (D. Neb. 2008); *Larsen v. JBC Legal Grp., P.C.*, 533 F. Supp. 2d 290, 302 (E.D.N.Y. 2008); *Goins v. JBC & Assocs., P.C.*, 352 F. Supp. 2d 262, 272 (D. Conn. 2005); *Simmons v. Miller*, 970 F. Supp. 661, 664-65 (S.D. Ind. 1997); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393-94 (D. Del. 1991); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987); *Baptist v. Global Holding & Inv. Co.*, No.

In *Phillips*, 736 F.3d 1076, for example, the Seventh Circuit concluded that the knowing filing of a time-barred claim against a debtor constitutes a false, deceptive, or misleading representation in violation of section 1692e of the FDCPA and use of an unfair or unconscionable debt collection method in violation of section 1692f. As *Phillips* explained, "'[t]he passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt.'" *Id.* at 1079 (quoting *Kimber*, 668 F. Supp. at 1487). The court also explained that professional debt collectors easily trap vulnerable consumers by filing suit on stale debts, observing that "'few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts,'" so they "'would unwittingly acquiesce to such lawsuits.'" *Id.* (quoting *Kimber*, 668 F. Supp. at 1487).

Kimber v. Federal Financial Corp., 668 F. Supp. 1480, the seminal district court decision cited by *Phillips* and numerous other courts, provides additional compelling justifications for the consensus view that the FDCPA bars the filing of indisputably stale claims in consumer debt-collection litigation. *Kimber* explained that attorneys and their clients have been sanctioned by courts for knowingly filing suit on claims subject to a time bar or other affirmative defenses, such as res judicata or a lack of personal jurisdiction. 668 F. Supp. at 1488 (collecting cases). The court viewed the fact that such conduct could be subject to sanctions in some

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04CV2365, 2007 WL 1989450, at *3 (E.D.N.Y. July 9, 2007); *Stepney v. Outsourcing Solutions, Inc.*, No. 97 C 5288, 1997 WL 722972, at *5 (N.D. Ill. Nov. 13, 1997).

circumstances as a reliable indicator that the practice is unfair and misleading under the FDCPA when directed at unsophisticated consumers. *Id.*

Kimber also rejected an argument similar to Midland Funding's here: that the filing of litigation on a time-barred claim is not misleading because statutes of limitations generally "bar only the remedy, not the underlying right." *Id.* at 1489. The court called that distinction "immaterial," explaining that the "dispositive fact is that a debt collector could not legally prevail in such lawsuit, and for the debt collector to represent otherwise is fraudulent." *Id.*

C. Recognizing that statements made in litigation filings, including suits to collect time-barred debts, may give rise to FDCPA liability is critical to protecting consumers. Debt collectors have repeatedly demonstrated that they are willing to abuse the judicial process in furtherance of their abusive debt collection tactics, and the FDCPA provides an important check on that conduct.

For example, in *Sykes v. Mel Harris & Associates, LLC*, 757 F. Supp. 2d 413 (S.D.N.Y. 2010), plaintiffs brought an FDCPA claim against a law firm and other defendants that entered into a scheme to fraudulently foreclose on thousands of New York homeowners by filing false affidavits in litigation. The court noted that the defendants in the case filed more than 104,000 debt-collection actions in New York City Civil Court alone between 2006 and 2008. *Id.* at 419. Ninety percent of the debtors defaulted, a result driven largely by the fact that defendants did not serve most of the debtors with notice of the suits. *Id.*; *see also Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 75-78 (2d Cir. 2015). The parties settled the FDCPA and other claims this year,

with defendants agreeing to pay $60 million into a settlement fund toward "damages to class members who suffered losses because they had judgments entered against them and were subjected to wage garnishments, bank levies, and other means of collection." *Sykes v. Harris*, No. 09 CIV. 8486, 2016 WL 3030156, at *1 (S.D.N.Y. May 24, 2016). Class members with the strongest claims received roughly 96 to 98 percent of their money back. *Id.* And as part of the settlement, some of the defendants were forced out of the debt collection and debt-buying industries altogether. *Id.*

The need for strong accountability under the FDCPA with respect to the more specific practice of debt collector suits to collect on time-barred debts is likewise well supported. Despite decades of case law indicating that suits to collect stale debts are unlawful under the statute, one legal service provider, analyzing a sample of the debt collection cases in its office over an eighteen-month period, "found that over fifty percent of the cases for which sufficient information was available were filed after the statute of limitations period had expired." Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration 29 (2010), *available at* goo.gl/vBXnPD. The rampant misuse of the legal process in this manner helps to explain why thirty-one state attorneys general recently urged the Consumer Financial Protection Bureau (CFPB) to adopt strong debt collection rules reining in debt collectors who "are increasingly using litigation to collect time-barred debts in an attempt to revive such debts." Comment of 31 State Attorneys General 26 (Feb. 28, 2014), *on* Debt Collection (Regulation F): Advance Notice of Proposed Rule-

making, 78 Fed. Reg. 67,848 (Nov. 12, 2013), *available at* http://1.usa.gov/20PFt0z.[3]

D. The Chamber of Commerce, as amicus curiae supporting Midland Funding, argues that determining whether a debt is time-barred is too complex an analysis to expect of debt collectors before they resort to collection through the bankruptcy process. Chamber Br. 12-18. This argument would, of course, apply equally to bankruptcy and non-bankruptcy litigation. And as discussed above, courts have recognized for nearly three decades that a debt collector violates the FDCPA when it knowingly brings a debt-collection suit on a time-barred claim. Law-abiding debt collectors have therefore long been under an obligation to comply with this prohibition and to make a good-faith inquiry with respect to a debt's legal enforceability.

Moreover, the legal obligation to avoid bringing time-barred claims to collect a debt goes beyond the FDCPA's prohibitions. For example, North Carolina has made it unlawful for certain debt collectors to bring suit against a debtor or to attempt to collect a debt in any other way if they know or reasonably should know that collection of the underlying debt is barred by the statute of limitations. N.C. Gen. Stat. § 58-70-115(4); *see also, e.g.*, Proposed Mass. R. Civ. P. 8.1, *available at* goo.gl/wbmXUV (proposing to require plaintiffs suing to collect credit-card debt to certify, "based on a reasonable inquiry, [that] the applicable limitations period has not

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[3] The CFPB, which has authority to prescribe rules on debt collection, *see* 15 U.S.C. § 1692*l*(d), is in the process of developing a regulation that addresses the interplay of the FDCPA and attempts to collect time-barred debt, including in consumer debt-collection litigation. *See* CFPB, Debt Collection (Regulation F): Advance Notice of Proposed Rulemaking, 78 Fed. Reg. at 67,875-78.

expired"). Similarly, in Wisconsin, the rule since at least 1944 has been that the state statute of limitations extinguishes the debt, which cannot be revived. *See* 12 Wis. Stat. Ann. § 893.05. As a result, an attempt to enforce a right on a time-barred debt violates the Wisconsin Consumer Act. *See Klewer v. Cavalry Invs., LLC*, No. 01-C-541, 2002 WL 2018830, at *4 (W.D. Wis. Jan. 30, 2002); *see also* 13 Miss. Code Ann. § 15-1-3 (providing that the expiration of the state statute of limitations extinguishes both the right and remedy).

Due to these legal obligations, debt collectors have a strong economic incentive to determine accurately whether a debt is time-barred, and experience indicates they know how to do it. For example, the price that mass debt buyers like Midland Funding are willing to pay for consumer debt drops dramatically based on the debt's age, which is generally known to the debt buyer and taken into account in purchases. *See* Federal Trade Commission, The Structures and Practices of the Debt Buying Industry v, 23-24 (2013), *available at* goo.gl/tuEquU. Even DBA International, a trade association for debt buyers (including Midland Funding), acknowledges that it prohibits debt-buying companies that it certifies from knowingly bringing or implying that they have "the ability to bring a lawsuit on a debt that is beyond the applicable statute of limitations." DBA Int'l Amicus Br. 2-4. The association would not impose this prohibition on companies if determining whether a consumer debt is time-barred were beyond the capability of debt collectors.

Thus, debt collectors around the country have been legally obligated to assess concerns about suit over stale claims for years. In many instances, regardless of the outcome in this case, they still will be, and they will have

an economic incentive to make those statute-of-limitations determinations accurately. The Chamber's claim that such determinations are too difficult for debt collectors and their lawyers to make is belied by this real-world experience.

In any event, whatever the challenges facing debt collectors in assessing whether a debt is time-barred, they are unquestionably less serious than those facing a debtor in bankruptcy against whom a time-barred proof of claim has been filed. For example, a debtor often does not know at the time a proof of claim is filed whether a debt buyer like Midland Funding has retained or even received the original contract documents. *See* Fed. R. Bankr. P. 3001(c)(3)(B). And in some states, the statute of limitations is shortened if a creditor does not have or cannot produce a written contract. *See, e.g., Portfolio Acquisitions, L.L.C. v. Feltman*, 909 N.E.2d 876, 884 (Ill. App. Ct. 2009). As a result, it is far easier for a debt collector—as the party with clear knowledge whether it can produce a contract in litigation—to determine whether a debt is time-barred.

II. This Court Should Decline To Adopt a "Competent Attorney or Trustee" Standard.

Every court of appeals to consider the issue has determined that the general rule for assessing whether a statement or practice is misleading or deceptive under section 1692e is based on the understanding of the "least-sophisticated" or "unsophisticated" consumer. *See, e.g., Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453-54 (3d Cir. 2006); *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *Jeter v. Credit Bureau, Inc.*, 760 F.2d

1168, 1175 (11th Cir. 1985).[4] This standard protects "all consumers, the gullible as well as the shrewd, the trusting as well as the suspicious, from abusive debt collection practices." *Brown*, 464 F.3d at 454 (internal quotation marks omitted). At the same time, the standard incorporates an objective element of "reasonableness" to protect against "liability for bizarre or idiosyncratic interpretations of collection notices" or other debt-collector representations. *Clomon*, 988 F.2d at 1319-20.

The least-sophisticated consumer standard is central to the FDCPA's protections under section 1692e. The FDCPA was enacted against the backdrop of Congress's conclusion that existing consumer protection laws, including the Federal Trade Commission Act, were "inadequate to protect consumers" from "abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a), (b). When Congress enacted the FDCPA, the Federal Trade Commission already "looked not to the 'reasonable consumer,' but to a less sophisticated consumer," in assessing whether debt collectors engaged in unfair and deceptive practices. *Jeter*, 760 F.2d at 1173. As the Eleventh Circuit has observed, it "would be anomalous for the Congress, in light of its belief that existing state and federal law was inadequate to protect consumers, to have intended that the legal standard under the FDCPA be *less* protective of consumers than under the existing 'inadequate' legislation." *Id.* at 1173-74.

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[4] The distinction between the "unsophisticated" and "least sophisticated" consumer labels is one "without much of a practical difference in application." *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996).

Midland Funding urges the Court, if it reaches the question, to view FDCPA liability under section 1692e through the perspective of a "competent trustee or attorney," not through the lens of the least-sophisticated consumer. Pet'r Br. 30. In Midland Funding's view, this heightened standard is appropriate because the proof of claim is directed not to the debtor, but to the bankruptcy trustee or, perhaps, to the debtor's attorney. *Id.* Midland Funding's standard should be rejected.

To state the obvious, it is the *debtor*'s estate that is at issue in a bankruptcy proceeding. To say that a filing in that proceeding is not directed at the debtor because it is routed through a court docket elevates form over substance. *Cf.* 15 U.S.C. § 1692a (defining a "communication" under the FDCPA as the conveyance "of information regarding a debt directly or *indirectly* to any person through any medium" (emphasis added)); *Kaymark*, 783 F.3d at 174 (applying the least-sophisticated consumer standard to a section 1692e claim based on representations in a complaint); *accord Donohue*, 592 F.3d at 1033. In addition, a debtor may object to proofs of claim, as Johnson did here. *See* Fed. R. Bankr. P. 3007(a); *see also* Fed. R. Bankr. P. 4002(a)(4) (identifying a debtor's duty to "cooperate with the trustee in . . . the examination of proofs of claim"). A creditor who files a proof of claim therefore necessarily does so with the understanding that it may be read and relied on by the debtor. The fact that a debtor is under no legal obligation to object, *see* Pet'r Br. 30, is irrelevant.

The standard Midland Funding advocates with respect to the perspective of a competent attorney is flawed for other reasons as well. As petitioner concedes, many debtors do not have counsel in bankruptcy. *Id.* And

when filing a proof of claim that has not been scheduled by a debtor, creditors may not know whether a debtor has counsel. The claim form asks for the bankruptcy case number and debtor's name, but a creditor does not need to identify the debtor's attorney. *See* Official Form 410, Proof of Claim (2016), *available at* http://www.uscourts.gov/forms/bankruptcy-forms/proof-claim-0. The filing of a proof of claim can also often be done electronically without using CM/ECF. *See, e.g.*, David D. Bird, *Bankruptcy Courts Strive to Contain Costs in Tight Budget Environment*, 32-APR Am. Bankr. Inst. J. 32 (2013) (describing ePOC, an electronic proof-of-claim filing system used by some bankruptcy courts). Moreover, even if a debt collector knows that a debtor is represented in bankruptcy, it does not know whether the scope of the agreed-upon representation extends to reviewing proofs of claim and objecting to them.

As a result, the filing of a proof of claim is much like the filing of a typical debt-collection complaint. In either case, a debtor may have the resources to retain counsel to review the filing, but the fact remains that the filing is directed, first and foremost, at the debtor.[5] Accordingly, the general standard under the FDCPA focusing on the least-sophisticated consumer should apply to determine whether a representation is false, misleading, or deceptive for the purpose of section 1692e.

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[5] This case presents no occasion to determine whether a letter or other document sent directly to a debtor's attorney, instead of filed in court, creates an exception to the general rule that section 1692e claims are assessed using the least-sophisticated consumer's perspective. *Compare, e.g., Bravo v. Midland Credit Mgmt., Inc.*, 812 F.3d 599, 601, 603 (7th Cir. 2016); *Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 574 (8th Cir. 2015).

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's judgment should be affirmed.

Respectfully submitted,

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No 16-348

IN THE

Supreme Court of the United States

MIDLAND FUNDING, LLC,
Petitioner,

v.

ALEIDA JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESURGENT CAPITAL SERVICES, L.P. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act.

2. Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.

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Collier on Bankruptcy (16th ed. 2016) 8, 10, 14, 15

Flynn, Ed, *Chapter 7 Asset Cases and Trustee Compensation*, 33 Am. Bankr. Inst. J. 48 (June 2014) 13

Lupica, Lois R., *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17 (2012) 13

U.S. Dep't of Justice, *Private Trustee Information*, https://www.justice.gov/ust/private-trustee-information (updated May 12, 2015) 8

INTEREST OF AMICUS CURIAE[1]

Resurgent Capital Services, L.P. services debt owned by affiliated and non-affiliated entities and files proofs of claim for that debt in bankruptcy cases. Resurgent and its affiliates, like the petitioner, have been sued in numerous cases alleging that the filing of proofs of claim on account of time-barred debt violates the Fair Debt Collection Practices Act. Indeed, the opinion below addresses not only the case currently before the Court, but also another case in which Resurgent was a defendant. *See* Pet. Br. 10 n.2; Pet. App. 1a. Moreover, an affiliate of Resurgent's is the respondent in a petition presenting the same question as that presented here, and that this Court is presumably holding pending the resolution of this case. *See Owens* v. *LVNV Funding, LLC*, No. 16-315.

SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act (FDCPA) is a consumer protection statute whose manifest purpose is to protect individual borrowers. Its text and legislative history make clear that, although the statute offers broad protection from unfair debt practices, including to certain third parties in addition to consumer borrowers themselves, all of those protections are ultimately directed at benefiting and protecting consumer borrowers.

A proof of claim in bankruptcy, however, is directed to an entirely different entity—the bankruptcy estate—which is essentially a trust operated for the

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[1] No counsel for a party authored this brief in whole or in part. No party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consent to the filing of amicus briefs.

benefit of creditors, and in which the debtor typically lacks any economic interest. Indeed, a principal purpose of the Bankruptcy Code is to *separate* the rights and interests of the debtor from those of the bankruptcy estate. To the extent that the allowance of a proof of claim for a time-barred debt causes an injury, that injury is borne by other creditors who risk receiving a diluted recovery on their claims against the estate—not by the debtor.

That is why the FDCPA has no application to the filing of proofs of claim. Under the Bankruptcy Code, an allowed proof of claim entitles a creditor to recover only from the bankruptcy estate, a legal entity that is comprised of certain property of the debtor but is separate and distinct from the consumer debtor. The estate is administered by a trustee—a bankruptcy professional appointed by the Office of the United States Trustee—who oversees the collection and distribution of estate property to creditors. The Code assigns to the trustee, not the consumer debtor, the duty to object to proofs of claim as to which there may be a valid defense. And it clearly considers statutes-of-limitations defenses to be defenses of the estate, not the consumer. The filing of a proof of claim has little to do, as a legal matter, with the consumer—and nothing to do with the FDCPA.

The allowance of a claim against an individual debtor's estate virtually never has any economic effect on the debtor. The vast majority of consumer (*i.e.*, individual) debtors seek relief under either chapter 7 or chapter 13 of the Bankruptcy Code. In both chapter 7 and chapter 13 cases, upon completion of the bankruptcy process, the consumer debtor will receive a discharge of certain prepetition debts. In chapter 7, a debtor must relinquish all of his or her nonexempt,

prepetition property to pay prepetition claims. It is exceedingly rare for anything to be left over to be distributed to the debtor, who is entitled to receive any remaining property only after prepetition creditors are paid in full. And in chapter 13 cases, the debtor is typically required to dedicate all of his or her projected disposable income over a three to five year period to paying prepetition claims—regardless of the magnitude of the claims against the estate. In either case, the total dollar value of allowed claims affects only the relative distributions of value among creditors and does not affect the debtor's obligations.

Some courts have concluded that filing a factually accurate complaint asserting a time-barred state-law collection action violates the FDCPA on the ground that the initiation of legal process against an unsophisticated consumer is inherently abusive. Even if that were correct, however, the principle has no application to the filing of a proof of claim, which has no effect on an individual debtor, and runs only against a bankruptcy estate that is represented by a court-appointed trustee with sophisticated counsel.

Finally, even if one were to read the FDCPA to create a cause of action for filing a proof of claim for a debt that is subject to a valid statute-of-limitations defense, both the Bankruptcy Code and the FDCPA would require that such a cause of action be pursued by the bankruptcy estate, not the individual debtor—thus underscoring that the FDCPA should not be construed to give rise to such a cause of action in the first place, as it would do nothing to advance the statute's consumer-focused purpose.

ARGUMENT

I. THE PROTECTIONS OF THE FDCPA ARE DIRECTED TO CONSUMERS

"The FDCPA is a consumer protection statute that prohibits certain abusive, deceptive, and unfair debt collection practices." *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1171 n.1 (2013). Importantly, the statute prohibits such practices only to the extent they affect "consumers and those who have a special relationship with the consumer ... such that the Act is still protecting the consumer." *O'Rourke* v. *Palisades Acquisition XVI, LLC*, 635 F.3d 938, 943 (7th Cir. 2011).

The statute's focus on consumers is reflected across its text and legislative history. They make clear that, consistent with Congress's purpose in enacting the law, the FDCPA prohibits only activities that burden or injure consumers.

First, the FDCPA's focus on consumers appears in the statute's definitional provisions. As the Petitioner's Brief explains (at 26-34), the statute prohibits the making of "false, deceptive, or misleading representation ... in connection with the collection of any debt," 15 U.S.C. § 1692e, and the use of "unfair or unconscionable means to collect or attempt to collect any debt," *id.* § 1692f.

In the FDCPA, however, the word "debt" is a term of art with a far narrower meaning than its ordinary English meaning of money that is owed. Rather, under the FDCPA, "debt" is defined as "any obligation or alleged obligation *of a consumer* to pay money arising out of a transaction in which the [goods or services] which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a (emphasis added). And the FDCPA defines "'consumer' [as] any *natural person* obligated or alleg-

edly obligated to pay any debt." *Id.* § 1692a(3) (emphasis added).

Second, the FDCPA's self-proclaimed purpose is "to protect consumers." 15 U.S.C. § 1692(b), (e). The statute explains that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy"—problems suffered only by consumers and other closely related natural persons. *Id.* § 1692(a).

The legislative history similarly declares that the FDCPA's "purpose is to protect *consumers* from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." S. Rep. No. 95-382, at 1-2 (1977) (emphasis added). It further clarifies that "the [statute] applies only to debts contracted by *consumers* for personal, family, or household purposes; it has no application to the collection of commercial accounts." *Id.* at 3 (emphasis added).

Third, the FDCPA's prohibitions address paradigmatic *consumer*-targeting harassment. For example, the statute prohibits "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass." 15 U.S.C. § 1692d(5). It forbids "[t]he use or threat of use of violence or other criminal means to harm the physical person." *Id.* § 1692d(1). And it bans various "false representation[s] or implication[s]," such as "that the debt collector is vouched for, bonded by, or affiliated with the United States or any State" or "is an attorney," or that "documents are legal process." *Id.* § 1692e(1), (3), (13).

In enacting the FDCPA, Congress found that those specific problems beset consumers—typically consumers who were commercially unsophisticated and with limited means to protect their legal interests. The legislative history explains that the "increasing incidence of debt collectors abusing consumers by using various means of harassment and deception" gave rise to the "[n]eed for [the] [l]egislation":

> Consumers are frequently sent phony legal documents. They are harassed by phone at home and at work. Debt collectors impersonate attorneys and policemen. If these tactics do not work, threats of bodily harm or death are sometimes made.... [T]hese debt collection tactics affect the lives of many consumers throughout the country.... Yet, at present there is no effective regulation of debt collectors.... [T]he facts of frequent consumer abuse and inadequate Federal and State regulation of debt collection practices make this legislation necessary and appropriate.

H.R. Rep. No. 95-131, at 2-4 (1977).

While the FDCPA allows nonconsumers to sue to enforce its provisions in certain situations, *see Wright* v. *Finance Serv. of Norwalk, Inc.*, 22 F.3d 647, 649 & n.1 (6th Cir. 1994); *see also* 15 U.S.C. § 1692k(a) ("Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person."), it does so only in the service of its core purpose of protecting consumers, *see O'Rourke*, 635 F.3d at 943.

For example, Congress determined that a debt collector should be liable when it harasses "the family,

employer and neighbors of the consumer." H.R. Rep. No. 95-131, at 8. In doing so, Congress rightly noted that such people are often targeted for harassment because of their close relationship to the consumer. *Id.* And it also explained how protecting these third parties operates to protect consumers. The House Report points out that "a debt collector's contact with a consumer's employer" can "constitute[] an unwarranted invasion of the consumer's privacy and interference with the consumer's employee-employer relationship." *Id.* at 5. The Senate Report echoes this statement, observing that "contact [with] third persons such as a consumer's friends, neighbors, relatives, or employer" can "result in serious invasions of privacy, as well as the loss of jobs." S. Rep. No. 95-382, at 4.

At bottom, then, the FDCPA seeks to protect against "the type of actions that would intimidate unsophisticated individuals and which ... would likely disrupt a debtor's life." *Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007). This context must guide interpretation of the statute. *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 460 & n.5 (1998); *U.S. Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).

II. The Filing Of A Proof Of Claim Against A Bankruptcy Estate Does Not Harm An Individual Debtor

Unlike the practices at which the FDCPA was aimed, the filing of a proof of claim in bankruptcy does not harm any individual consumer debtor. In either a chapter 7 or a chapter 13 bankruptcy, a creditor files a proof of claim against the bankruptcy estate—an entity distinct from the debtor that is represented by sophisticated bankruptcy professionals. And in the typical

case, whether a proof of claim is allowed or disallowed has no effect at all on the debtor. The claims allowance process in bankruptcy simply falls outside the ambit of the FDCPA.

A. A Proof of Claim Does Not Run Against The Debtor—It Runs Against The Bankruptcy Estate

Proofs of claim are "file[d] ... against the [bankruptcy] estate." *Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 449 (2007); *see also* 4 *Collier on Bankruptcy* ¶ 501.01[2][a] (16th ed. 2016) (filing a proof of claim reflects "a claim on the assets of the bankruptcy estate").

The estate is a legal entity—wholly distinct from the debtor—that comes into being upon the filing of a bankruptcy petition. 11 U.S.C. § 541(a); *see also United States* v. *Mitchell*, 476 F.3d 539, 544 (8th Cir. 2007) ("The filing of a bankruptcy petition creates a new legal entity: the bankruptcy estate.").

The Bankruptcy Code sets out the property that comes into the bankruptcy estate: "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The bankruptcy estate is administered by a trustee—a bankruptcy professional appointed by the Office of the United States Trustee[2]—who oversees the collection

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[2] The Office of the United States Trustee has appointed between one and five "standing" chapter 13 trustees in each federal judicial district who serve as trustees in chapter 13 cases in their respective districts. In chapter 7 cases, the trustee is assigned from a list of chapter 7 "panel" trustees appointed by the Office of the United States Trustee. *See* U.S. Dep't of Justice, *Private Trustee Information*, https://www.justice.gov/ust/private-trustee-information (updated May 12, 2015).

and liquidation of that property and its distribution to creditors with allowed claims. 11 U.S.C. §§ 321-323, 701-705, 1302; *see also* H.R. Rep. No. 95-595, at 91-92 (1977).

The debtor stands separate and apart from the estate; they "are distinct entities in an individual's bankruptcy proceeding." *Katz* v. *C.I.R.*, 335 F.3d 1121, 1127 (10th Cir. 2003); *see also, e.g., In re Smith*, 235 F.3d 472, 477-478 (9th Cir. 2000) ("The Bankruptcy Code distinguishes between property of the estate in bankruptcy and property of the debtor."). As Congress has recognized, the long-standing "premise" underlying bankruptcy law is "that the money of the estate [i]s essentially a trust for the benefit of the bankrupt's *creditors*." H.R. Rep. No. 95-595, at 91 (emphasis added).

Once a bankruptcy petition is filed, an automatic stay takes effect, barring creditors from attempting to "exercise control over property of the estate," 11 U.S.C. § 362(a)(3), or attempting to enforce or collect prepetition claims against the debtor or the estate, *see id.* § 362(a) (separately addressing the automatic stay protections enjoyed by "property of the estate" and "property of the debtor"). The automatic stay ensures both that the trustee can marshal and distribute the debtor's assets without disruption and that creditors need not compete in a "race to the courthouse" to enforce their claims.

While the Bankruptcy Code thus halts any collection activity against *the debtor* during the pendency of the bankruptcy case, it permits creditors to seek recovery on their prepetition claims from *the bankruptcy estate*. Creditors who wish to receive a distribution from the estate must file a proof of claim, which is generally "deemed allowed" unless a party in interest objects. 11

U.S.C. §§ 501, 502. If a party in interest objects, the bankruptcy court determines whether the claim should be allowed, generally by applying nonbankruptcy law. *See id.* § 502(b). Where a proper objection is filed to a proof of claim for a debt whose collection is barred by the statute of limitations under applicable state law, the proof of claim would be disallowed. *Id.* § 502(b)(1).

The Code assigns to the trustee—not to the debtor—the duty to "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. § 704(a)(5); *see also id.* § 1302(b)(1) (incorporating this duty by cross-reference). And it provides that "[t]he estate shall have the benefit" of any defense to any claim that would be available to the debtor under nonbankruptcy law, including "statutes of limitation[s]." *Id.* § 558; *see also* 5 *Collier on Bankruptcy* ¶ 558.01 (defenses otherwise belonging to the consumer "inure to the benefit of the estate"). Moreover, "[a] waiver of any such defense by the debtor after the commencement of the case does not bind the estate." 11 U.S.C. § 558.

In sum, in contrast to a collection action directed against an unsophisticated consumer, a proof of claim is directed against an estate represented by a sophisticated trustee and its counsel.

B. The Allowance Of A Claim Almost Always Has No Economic Effect On The Debtor

In the vast majority of consumer bankruptcy cases, whether a proof of claim is allowed or disallowed affects only the distribution among creditors and will have no effect on the debtor. Indeed, as a matter of bankruptcy law, a consumer debtor rarely even has standing to object to the allowance of a claim. That is because the

debtor typically has no "pecuniary interest" in the proceedings: "[N]o matter how the estate's assets are disbursed by the trustee, no assets will revert to the debtor." *In re Cult Awareness Network, Inc.*, 151 F.3d 605, 607 (7th Cir. 1998).

1. *Chapter 7.* "Chapter 7 ... gives an insolvent debtor the opportunity to discharge his debts by liquidating his assets to pay his creditors." *Law* v. *Siegel*, 134 S. Ct. 1188, 1192 (2014). In a chapter 7 bankruptcy, the filing of the petition creates the estate, 11 U.S.C. § 541(a)(1), and triggers appointment of the trustee, *id.* § 701, whose duties include "collect[ing] and reduc[ing] to money the property of the estate," *id.* § 704(a)(1), distributing the proceeds to creditors, *id.* § 726.

In a chapter 7 case, the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). An individual debtor may exempt certain assets—*e.g.*, a certain amount of equity in a residence or a vehicle—from the estate and thus from creditor claims. *Id.* § 522. If there is any nonexempt estate property unencumbered by a lien—in most chapter 7 cases, there is none—the chapter 7 trustee sells that property and distributes the proceeds according to creditors' statutory priority. The total size of the estate—the total value available for distribution to creditors—is in no way dependent upon the number and dollar amount of proofs of claim filed against the estate. Rather, the total value of allowed claims against the bankruptcy estate affects only the percentage payment that creditors receive. In other words, the consequence of allowance of any given proof of claim is that it dilutes the recoveries of other creditors holding allowed claims—it makes no difference at all to the debtor.

In return for surrendering nonexempt prepetition assets for distribution to creditors, the chapter 7 debtor may receive a discharge of certain prepetition debt, meaning that, after the bankruptcy, those creditors can no longer pursue the debtor for payment on their claims. 11 U.S.C. §§ 524, 727; *see Law*, 134 S. Ct. at 1192.[3] The discharge "operates as an injunction against the commencement or continuation of an action ... to collect ... any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). Most importantly, it applies whether or not the creditor has received any distribution from the estate on its claim. *Id.* §§ 524, 727; *see also Law*, 134 S. Ct. at 1192.

Because the property that the debtor must surrender to the estate does not depend on the dollar amount of allowed claims against the estate, and because the debtor's entitlement to a discharge does not depend on the amount creditors receive in the bankruptcy, allowance or disallowance of any given claim is—except in the extremely rare case—irrelevant from the chapter 7 debtor's perspective. It affects only the recoveries amongst creditors.

It is true that, if all creditors have been paid in full from the estate, the debtor is entitled to the remainder. 11 U.S.C. § 726(a)(6). But this situation is the "limited and rare exception" to the normal course of events. *In re Tuttle*, 259 B.R. 735, 739 (Bankr. D. Kan. 2000); *see also Cult Awareness Network*, 151 F.3d at 607 ("Debtors, particularly Chapter 7 debtors, rarely have ... a pecuniary interest [in a bankruptcy order] because no matter how the estate's assets are disbursed by the trustee, no assets will revert to the debtor."). Indeed,

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[3] Discharge may be denied for certain misconduct, 11 U.S.C. § 727(a), and certain debts are non-dischargeable, *id.* § 523(a).

the vast majority of chapter 7 cases are so-called "no asset" cases: After subtracting the assets they are entitled to exempt from the estate under section 522, individual chapter 7 debtors typically have no property that is unencumbered by a lien remaining for *any* distribution to unsecured creditors, let alone property sufficient to pay all creditors *in full* and provide a surplus to the debtor.[4]

2. *Chapter 13.* In a chapter 13 case, the debtor proposes a plan to pay creditors with future income rather than liquidation of existing assets, as would occur in chapter 7. Eligible debtors with a regular income may retain their prebankruptcy assets, propose a plan to repay prepetition creditors over time from their future income over a fixed period of three or five years, and receive a discharge of certain prepetition debts upon completion of the repayment plan. *Hamilton* v. *Lanning*, 560 U.S. 505, 508 (2010); *see also* 11 U.S.C. § 1328 (discharge under chapter 13).

In a chapter 13 case, therefore, the bankruptcy estate is comprised not only of the debtor's interests in property "as of the commencement of the case," 11 U.S.C. § 541(a)(1), but also "earnings from services performed by the debtor after the commencement of the

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[4] *See Colonial Sur. Co.* v. *Weizman*, 564 F.3d 526, 531 (1st Cir. 2009) ("'Most chapter 7 cases involving individual debtors are no asset cases.'" (quoting Administrative Office of the United States Courts, *Chapter 7—Bankruptcy Basics*, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx (last visited Nov. 21, 2016))); Flynn, *Chapter 7 Asset Cases and Trustee Compensation*, 33 Am. Bankr. Inst. J. 48, 48 tbl. 1 (June 2014) (between 2006 and 2011, only 7.9% of chapter 7 cases were closed as asset cases); Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 68 (2012) (finding that 89.4% of chapter 7 cases filed after the 2005 Bankruptcy Code amendments were no-asset cases).

case, but before the case is closed, dismissed, or converted to a case under chapter 7, 11 or 12 of this title, whichever occurs first," *id.* § 1306(a).

Moreover, unlike in chapter 7, the consumer "remain[s] in possession of all property of the estate" during the bankruptcy case unless a confirmed plan provides otherwise. 11 U.S.C. § 1306(b). Consequently, the role of the trustee in a chapter 13 case is different than in a chapter 7 bankruptcy. *See id.* § 1302. The chapter 13 trustee generally does not take possession of and liquidate the debtor's property to make distributions to creditors. Rather, the debtor is charged with the rights and duties of a trustee with respect to the property of the estate in his possession. *Id.* § 1303; *see also* 8 *Collier on Bankruptcy* ¶ 1300.22[1].

Despite these distinctions, the consumer debtor is typically just as indifferent to the allowance or disallowance of proofs of claim in chapter 13 as in chapter 7. That is because a chapter 13 debtor typically dedicates all of his or her projected disposable income for the plan period to the plan, regardless of the magnitude of the claims against the estate.

Promptly after the petition date, a chapter 13 debtor is required to file a proposed plan for repayment of creditors over a three or five-year period. 11 U.S.C. § 1321; Fed. R. Bankr. P. 3015(b). "If an unsecured creditor or the bankruptcy trustee objects to [plan] confirmation, § 1325(b)(1) requires the debtor either to pay unsecured creditors in full or to pay all 'projected disposable income' to be received by the debtor over the duration of the plan." *Hamilton*, 560 U.S. at 508-509; *see also* 11 U.S.C. § 1325(b)(1).

Because the debtor typically lacks the financial means to pay all claims in full, the requirements of sec-

tion 1325(b)(1) usually force the debtor to commit to pay all of his or her disposable income during the repayment period to secure plan confirmation. Thus, in chapter 13, as in chapter 7, the debtor is generally unaffected by a creditor's filing of a proof of claim: The only consequence of the allowance of a claim as to which there might have been a valid objection is that other creditors' recovery is diluted. *See In re LaGrone*, 2015 WL 2330314, at *3 (Bankr. N.D. Ill. May 14, 2015) ("In most Chapter 13 cases, ... the debtor is proposing to pay all general unsecured claims less than in full from a limited contribution. Payment of an additional unsecured claim ... simply reduces the amount paid to other unsecured creditors; it does not cause the debtor to pay more into the plan."); *see also* 8 *Collier on Bankruptcy* ¶ 1325.11.

Indeed, if anything, a chapter 13 debtor benefits from the filing of a proof of claim for debt that is subject to a statute-of-limitations defense. This is so because the chapter 13 discharge extends only to "unsecured debts provided for by the plan or disallowed under section 502 of this title." 11 U.S.C. § 1328(c). Accordingly, in the absence of the filing of a proof of claim, the holder of a claim subject to a statute-of-limitations defense would—except for the unusual case in which the debt is included on the debtor's schedules—be permitted after the bankruptcy to engage in collection activity, as state law typically allows (*see* Pet. Br. 17-18 & n.3). The filing of a proof of claim renders that debt dischargeable in a chapter 13 bankruptcy, and thus subject to the discharge injunction, which bars the type of collection activity otherwise permitted by state law for debt that is subject to a valid statute-of-limitations defense.

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Congress's manifest purpose in enacting the FDCPA was to protect individual consumers from debt collection practices that it considered abusive or misleading. The filing of a proof of claim is an act to collect from a bankruptcy estate—not from any individual consumer. The claim's allowance or disallowance is typically a matter of complete indifference to the individual debtor—the affected parties are other *creditors*, whose interests are protected by a court-appointed trustee. The claims-allowance process in bankruptcy therefore falls entirely outside of the purposes for which the FDCPA was enacted, and outside the cause of action the FDCPA creates for the benefit of consumers.

III. If The FDCPA Were To Create A Cause Of Action, It Would Belong To The Estate, Not The Debtor

Under both settled principles of bankruptcy law and the language of the FDCPA, if the Court were to conclude that the filing of an accurate proof of claim for debt that is subject to a valid statute-of-limitations defense were actionable under the FDCPA, the cause of action would belong to, and could only be asserted by, the bankruptcy estate, not the individual debtor. Indeed, a debtor would lack Article III standing to assert such a claim because there is no injury to any legally protected interest of the *debtor*. More fundamentally, the point illustrates that the FDCPA should not be construed to provide a cause of action here. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 455 ("'[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'" (alteration in original)); *see also Ransom* v. *FIA Card Servs., N.A.*,

562 U.S. 61, 71 (2011); *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011).

A. As A Matter Of Bankruptcy Law, Any Cause Of Action Under The FDCPA Could Be Asserted Only By The Estate, And Not By The Debtor

Bankruptcy law makes clear that causes of action seeking redress for an injury to the bankruptcy estate may be brought only by the trustee for the benefit of the bankruptcy estate—not by an individual debtor for his or her own benefit.

Section 541 of the Bankruptcy Code makes clear that claims belonging to the debtor that arise before the petition date become property of the estate, and thus cannot be pursued by individual debtors. For example, in *Auday* v. *Wet Seal Retail, Inc.*, 698 F.3d 902 (6th Cir. 2012), the Sixth Circuit held that an individual debtor lacked standing to pursue an employment discrimination claim arising out of her termination four days before her bankruptcy filing.[5] Upon the bankruptcy filing, that claim became property of the bankruptcy estate, to be pursued (or not) by the trustee for the benefit of the estate. "[A]bsent abandonment, only the Trustee may bring the age-discrimination claim, and [the debtor] has no standing to pursue it alone." *Id.* at 904.

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[5] While many of the cases discussed in text use the term "standing," as this Court explained in *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the question whether a particular litigant falls within the zone of interests protected by a particular statute is best understood as raising a traditional question of statutory construction rather than an issue of "prudential standing."

The same principle applies to claims arising out of postpetition actions that are directed at the bankruptcy estate, rather than the debtor personally. For instance, the Ninth Circuit has held that an individual debtor did not have standing to bring a claim against a bank for having frozen the debtor's bank account, allegedly in violation of the automatic stay, when the account was property of the estate, rather than the individual debtor's property. *In re Mwangi*, 764 F.3d 1168, 1174 (9th Cir. 2014); *see also In re Cook*, 520 F. App'x 697, 701 (10th Cir. 2013) ("'In the context of bankruptcy proceedings, it is well understood that a trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed.'"); *Moses* v. *Howard Univ. Hosp.*, 606 F.3d 789, 795 (D.C. Cir. 2010) (same).[6]

The same is true here. As explained above, to the extent that the allowance of a proof of claim for a time-barred debt causes any injury, that injury is borne by the bankruptcy estate (and, indirectly, by other creditors), not the individual debtor. It therefore follows that if the FDCPA were construed to create a cause of action arising out of such conduct, bankruptcy law would grant that cause of action to the estate rather than to the debtor.

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[6] The chapter 13 plan that was confirmed in this case makes clear that estate property remains property of the bankruptcy estate throughout the plan's repayment period, and does not revest in the individual debtor until "discharge or dismissal of the case." JA9; Chapter 13 Plan ¶13(b), *In re Johnson*, No. 14-00917 (Bankr. S.D. Ala.), Dkt. 2.

B. The FDCPA Similarly Bars An Individual Debtor From Suing To Recover On Account Of An Injury To A Bankruptcy Estate

Consistent with ordinary principles of standing, the FDCPA itself likewise operates to preclude an individual debtor from bringing suit on account of collection activity that is directed against a bankruptcy estate. The provision of the FDCPA creating a private right of action provides that a debt collector who fails to comply with the statute "with respect to any person is liable to such person" for damages as set forth in the statute. 15 U.S.C. § 1692k(a).

The work done by this language is clear: Liability under the statute runs only to the "person" "with respect to [whom]" the debt collector failed to comply with the statute. Even assuming that entities other than natural persons (such as bankruptcy estates) are "persons" entitled to protection under the FDCPA, *see Anarion Investments LLC* v. *Carrington Mortgage Servs.*, 794 F.3d 568 (6th Cir. 2015) (so holding),[7] the statute grants a right of action only to the "person" who is the target of the allegedly improper debt-collection activity. Because a bankruptcy estate, not an individual debtor, is the "person" against which a proof of claim is filed, the statute does not give rise to a cause of action by the debtor arising out of that filing.

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[7] Notably, Judge Donald, one of the few courts of appeals judges to have served as a bankruptcy judge, dissented from the Sixth Circuit's conclusion that entities other than natural persons are protected by the FDCPA. *Anarion*, 794 F.3d at 571 (Donald, J., dissenting).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petitioner's Brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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